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Unequal Liberty and a Right to Education

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UNEQUAL LIBERTY AND A RIGHT TO EDUCATION

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This article lays the groundwork for a liberty-based federal constitutional right to quality public schooling. We start from the premise that Black, Brown, and poor children now and historically have never enjoyed equal liberty in the United States, and that, for these children, the public school, like the prison, functions as a site of social control, relying upon confinement and force, while failing to fulfill its pedagogic purpose. In urging a liberty-based rationale, we rest on the foundational principle that the state cannot deprive a person of liberty without a legitimate justification. Nevertheless, states throughout the United States confine thousands of Black, Brown, and poor children to public schools that do not meaningfully educate and instead serve as no more than unsafe and harmful warehouses for the students detained within them. Having first unequally apportioned educational opportunity, the state then compels attendance in these schools on pain of civil or criminal penalties. The confinement of Black, Brown, and poor children within resource-starved carceral schools maintains and reproduces race-class subjugation within a system of racial capitalism.

We argue, within the frame of abolition constitutionalism, that the state violates the traditional guarantee of equal liberty if a state's system of public schooling relegates Black, Brown, and poor children to sub-standard and unsafe schools that perpetuate the children's persistent structural disadvantage. In our view, such a system produces and reinforces the very kind of racial and class caste that the Fourteenth Amendment aimed to abolish. Judicial remedies that order states to provide education pitched at a level of basic literacy will not remedy the constitutional violation, but instead further entrench lifelong social, economic, and political confine-

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ment. The principle of equal liberty requires that public schooling, to be adequate, afford opportunities for quality education that allow children to flourish. If a state cannot provide a quality education in the child's "assigned" school district, then the state must remedy the violation by releasing the child from confinement and allowing the child to transfer to public schools elsewhere that do meet educational standards.

In the midst of the COVID-19 pandemic, when carceral confinement was known to heighten the risk of infection and death,[2] the state of Michigan ordered Grace, a Black teenage girl with hyperactivity disorder, to be detained in a juvenile facility for not completing her online coursework. Released after 78 days, Grace remained on home confinement "with a GPS tether," and was told she "must attend school and do schoolwork as directed, though school is not currently in session."[3] In response to her initial incarceration, community members organized a social media hashtag: "#FreeGrace."[4] Technology has advanced, but their message echoed an NAACP placard from sixty years ago protesting school segregation in St. Louis, Missouri: "Don't Treat Our Children Like Prisoners."[5]

This article lays the groundwork for a liberty-based federal constitutional right to quality public schooling. Our argument is explicitly aligned with the ideals of abolition constitutionalism, which, relying on the emancipatory potential of the Reconstruction Amendments, supports the praxis of ending the prison-industrial complex and the racial and class subordination that the carceral state perpetuates.[6] The goal is that of critique and con-

2. *See* Brendan Saloner, Kalind Parish, and Julie Ward, *COVID-19 Cases and Deaths in Federal andStatePrisons*,324(6)JAMA602(July8,2020), https://jamanetwork.com/journals/fullarticle/10.1001/jama.2020.12528 (reporting that the risk of prisoners' contracting COVID-19 is 4.6 times that of the general population and the risk of death from the virus is 2.6 times higher). *See also* Casey Tolan, Nelli Black, and Drew Griffin, *Inside the Federal Prison Where Three out of Every Four Inmates Have Tested Positive for Coronavirus*, CNN (Aug. 8, 2020), https://www.cnn.com/2020/08/08/us/federal-prison-coronavirus-outbreak-invs/index.html.

3. Jodi S. Cohen, *"Grace," the Oakland Co. Teen Detained for Skipping Homework Is Released*, DETROITFREEPRESS(July31,2020), https://www.freep.com/story/news/local/michigan/oakland/2020/07/31/free-grace-oakland-county-probation-homework-appeal-release/5560282002/.

4. *See* Aimee Ortiz, *Court Frees Michigan Teen Who Was Held for Skipping Online Schoolwork*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/us/michigan-teen-homework-release.html?referringSource=articleShare ("People protested in support of the high school student outside Oakland County Circuit Court in Pontiac, Mich., earlier this month.").

5. *See* Douglas Jay, *From the NS Archive—Disunited States: 11 February 1956, Public Opinion Following the Ban of Racial Segregation in American Schools*, NEW STATESMAN (21 July 2020), https://www.newstatesman.com/2020/07/ns-archive-disunited-states.

6. According to a common definition, the prison-industrial complex is "the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems[,]" which functions to "maintain[] the authority of people who get their power through racial, economic and other privileges." *What Is the PIC? What Is Abolition?*, CRITICAL

struction. In particular, we see the constitutional project of establishing a federal constitutional right to education as one of the "building blocks" for creation of "the beloved community,"[7] or of what Dorothy E. Roberts, a leading scholar of abolition constitutionalism, has called "a more humane, free, and democratic world."[8] Thus, this constitutional project supports the understanding of abolition constitutionalism as seeking to bring about the presence of "life-affirming institutions," and to destroy the carceral infrastructure that instantiates their absence.[9]

We start from the premise that Black, Brown, and poor children now and historically have never enjoyed equal liberty in the United States, and that, for these children, public schools, like prisons, function as a site of social control that relies upon confinement and force while failing to fulfill their pedagogic purpose.[10] In urging a liberty-based rationale, we rest on the foundational principle—one that antedates the Reconstruction Amendments—that the state cannot deprive a person of liberty without a legitimate justification. Yet, thousands of Black, Brown, and poor children in the United States are confined to public schools that do not meaningfully edu-

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RESISTANCE (2020), http://criticalresistance.org/about/not-so-common-language/. In 1974, the North Carolina Prisoners Labor Union used the term "judicial-prison-parole-industrial complex." *See* DAN BERGER & EMILY K. HOBSON, REMAKING RADICALISM: A GRASSROOTS DOCUMENTARY READER OF THE UNITED STATES, 1973–2001 172 (2020). The first known use of the term in its current form was in 1976. ROBERT BROWN, SCOTT CHRISTIANSON, LYNN COBDEN, FAY HONEY KNOPP, JANET LUGO, VIRGINIA MACKEY, VINCENT MCGEE, AND SHARON SMOLICK, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 181 (Critical Resistance 2002) (1976) ("By identifying the structures and decision-making processes, the people and institutions that comprise the prison/industrial complex, we begin to cast light on some hidden functions of prisons which serve particular interests."). Its use was popularized in the 1990s. *See, e.g.*, Mike Davis, *Hell-Factories in the Fields: A Prison-Industrial Complex*, THE NATION (Feb. 20, 1995); Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998).

7. The phrase was coined by Josiah Royce, appeared in Martin Luther King, Jr.'s speech at the end of the Montgomery bus boycott in 1956, and embraced as well by John E. Lewis. We use the term not as a religious statement, but as a statement of political faith in the possibility of creating "a just community," and of "not merely explicating an unjust social order." Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King*, 103 HARV. L. REV. 985, 988 (1990).

8. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism—The Supreme Court 2018 Term*, 133 HARV. L. REV. 1, 12 (2019) [hereinafter *Abolition Constitutionalism*].

9. Haymarket Books, *Covid 19, Decarceration, and Abolition: An Evening with Ruth Wilson Gilmore*, YOUTUBE (Apr. 28, 2020), https://www.youtube.com/watch?v=hf3f5i9vJNM.

10. *See infra* Part II(B)–(C). For an early articulation of this view, *see* CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO 45 (1933) ("The education of the Negro, then, becomes a perfect device for control from without."); *see also id.* at 63 ("[T]he keynote in the education of the Negro has been to do what he is told to do. Any Negro who has learned to do this is well prepared to function in the American social order as others would have him."); *see also* Herbert Aptheker, *Introduction*, *in* W.E.B. DU BOIS'S THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES 1906–1960 XIII (1973) (explaining that Du Bois understood "tru[e] education" to be "fundamentally subversive" "given the realities of the social order" in which Black people were subject to control by the white population) (hereinafter THE EDUCATION OF BLACK PEOPLE).

cate and instead function as unsafe and harmful warehouses for the children detained within them.

We use the word "confined" consciously, for the state's assignment of Black, Brown, and poor children to particular public schools is not random or ad hoc. Rather, it begins with the state's decision to apportion educational opportunity by districts within limited geographic areas that sort children by race and class.[11] The legal boundaries of these school districts confine the child within a fixed geographic space, prohibiting the child from attending schools in more affluent neighborhoods, and enforcing that prohibition by criminal punishment when necessary. Spatial confinement inevitably produces economic confinement, stunting the child's lifetime ability to acquire the income and assets needed to achieve geographic mobility. The state's proffered justification for such line-drawing—local control over education—no longer carries empirical support (if it ever did), for it withholds from the households within affected local districts the resources they need to carry out their educational goals.[12] Local line-drawing not only perpetuates racial and class segregation,[13] but also excludes Black, Brown, and poor people from participating in decisions about their children's public schooling. In a perversion of the concept, local control has become control by public school districts of local communities of color that are kept marginalized and disempowered. Confinement operates on another level, too. Once the state has sorted the children by race and class, confining them to sub-standard schools that they are mandated to attend, the state not only disciplines truancy through the juvenile justice system, but also contracts with security officers and police to restrain children for "acting out" or throwing tantrums, using suspension to punish the children, and confining them in juvenile detention upon court order where educational services are minimal and sub-standard.[14]

The confinement experienced by Black, Brown, and poor students in resource-starved carceral public schools serves to maintain and reproduce

11. Derek W. Black uses the term gerrymandering to refer to the process by which a state manipulates geographic boundaries, together with funding formulas, in its design of public school districts. Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1390-91 (2019) (describing manipulation of school boundaries and funding formulas as "gerrymandering" because they are "calculated and illicit attempts to underfund the education of some students"). Black argues that "gerrymandering school funding to advantage and disadvantage students is unconstitutional, regardless of the precise adequacy and equity outcomes it produces," *id.* at 1391, because the naked preference to disadvantage certain groups, even if those groups are not treated as suspect classes for federal equal protection analysis, is impermissible.

12. *Id.* at 1415.

13. *See generally* CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018).

14. *See, e.g.*, TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM, 1899–1945 (2018).

economic stratification within a system of racial capitalism.[15] On the one hand, this confinement enables racial capitalism by "tracking" already marginalized students toward low-wage and coerced labor through punitive discipline,[16] under-education,[17] and other forms of debasement.[18] In so doing, carceral schools actively participate in the process of racialized differentiation that is necessary for—or at the very least facilitates—hyper-exploitation under a racial capitalist regime.[19] On the other hand, carceral schools indirectly stabilize racial capitalism by funneling marginalized students into the criminal punishment system, on which racial capitalism relies

15. *Abolition Constitutionalism*, *supra* note 8, at 7 ("[T]he expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime.").

16. Angela Y. Davis, *From the Convict Lease System to the Super-Max Prison*, *in* STATES OF CONFINEMENT: POLICING, DETENTION, AND PRISONS 60, 72 (Joy James, ed., 2000) ("In poor black communities . . . schools tend to direct resources needed to address educational crises toward security and discipline. . . [and are] becoming prep schools for prison, molding black children into raw material for punishment and coerced labor.").

17. Erica Meiners, *Ending the School-to-Prison Pipeline/Building Abolition Futures*, 4 URB. REV. 547, 550–51 (2011) ("Public education in the United States has historically aggressively framed particular populations as superfluous to our democracy yet imperative for low wage work. . . . [T]he targeted under- or un-education of particular populations . . . has always tracked poor, non-white, non-able bodied, non-citizens and/or queers toward under or un-education, non-living wage work, . . . and/or permanent detention.") [hereinafter *Building Abolition Futures*].

18. MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 150 (1983) (describing the "ideological dependency" caused by the fact that "[t]he Black child attending public school is burdened immediately with an educational pedagogy which rests on the assumption of his/her cultural and intellectual inferiority").

19. The term "racial capitalism" was first used to describe South Africa's political economy under Apartheid. MARTIN LEGASSICK & DAVID HEMSON, FOREIGN INVESTMENT AND THE REPRODUCTION OF RACIAL CAPITALISM IN SOUTH AFRICA (1976). The concept was adapted by Cedric Robinson to form a general thesis about capitalism. Robinson described capitalism as operating through projects of "differentiation" whereby "regional, subcultural, and dialectical differences" were "exaggerate[d] . . . into 'racial' ones," and then the supposed "racial[] inferior[ity]" effectively justified "domination and exploitation." CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 26 (1983). In Robinson's analysis, "[t]he development, organization, and expansion of capitalist society pursued essentially racial directions" with the result that "racialism . . . inevitably permeate[d] the social structures emergent from capitalism." *Id.* at 2. One of the primary implications of Robinson's argument that "[r]acism . . . was not simply a convention for ordering the relations of European to non-European peoples but has its genesis in the 'internal' relations of European peoples"—specifically, in the construction of a capitalist economic order—is that capitalism depends on racializing projects to maintain the hierarchies needed for exploitation and class dominance. For recent articulations, *see, e.g.*, BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA 18 (2019) ("As a system and mode of production that necessitates inequality to function, capitalism, and perhaps especially within liberal democracies, requires race as an ideology and racism as a hierarchical system to enshrine that inequality as legitimate, even natural.") [hereinafter PRISON LAND]; Jodi Melamed, *Racial Capitalism*, 12 CRITICAL ETHNIC STUD. 76, 77 (2015) ("Capital can only be capital when it is accumulating, and it can only accumulate by producing and moving through relations of severe inequality among human groups[,] . . . and racism enshrines the inequalities that capitalism requires."). The concepts, but not the term, were previously explored by scholars and organizers such as Claudia Jones, Esther V. Cooper Jackson, Sojourners for Truth and Justice, and others. *See* Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, MONTHLY REV. (July 1, 2020), https://monthlyreview.org/2020/07/01/modern-u-s-racial-capitalism/.

to manage "surplus populations" whom the legal and political systems subject to "organized abandonment"[20] with its associated joblessness and inequality.[21] In this account, public schools, rather than functioning as tools for liberation, exacerbate and cement unequal liberty.

In our view, abolition constitutionalism gestures to the appropriate legal pathway to "Free Grace"—and all students ensnared by various forms of confinement in the profoundly unequal public school system in the United States—for it acknowledges rather than ignores, sidesteps, or camouflages the violence and restraint that public schools currently impose upon young people who are Black, Brown, or poor. It recognizes the harms done to children who are confined in public schools that function at worst as extensions of a carceral state and at best as factories for reproducing expendable low-wage workers.[22] Abolition constitutionalism demands that a federal right to education afford children more than simply the minimum skills presumed necessary to participate in a society wracked by racial and class subordination. Rather, a right to education must be part of a larger democratic project that encourages human flourishing in a society that is still in creation. We do not disguise the aspirational nature of the argument, but in our view, it is imperative—and critical for fulfilling the democratic vision

20. Ruth Wilson Gilmore describes organized abandonment as the state-facilitated process of capital disinvestment and deindustrialization that displaces workers from jobs and eviscerates public sector services. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 58–86 (2007). The process results in "surplus populations"—"workers at the extreme edges, or completely outside, of restructured labor markets, stranded in urban and rural communities." *Id.* at 70. The legal and political systems support racial capitalism through rules governing such matters as labor, taxation, and corporate responsibility.

21. *See, e.g.*, Dan Berger, *How Prisons Serve Capitalism*, PUB. BOOKS (Aug. 17, 2018), https://www.publicbooks.org/how-prisons-serve-capitalism ("[C]arceral expansion is a form of political as well as economic repression aimed at managing worklessness among the Black and Brown (and increasingly white) working class for whom global capitalism has limited need."); PRISON LAND, *supra* note 19, at 18 ("Prisons . . . absorb the labor and land rendered surplus by deindustrialization and the globalization of capital. They also operate as a new kind of labor-market institution. . . that . . . has shown to conceal unemployment in the short run, by absorbing many who would assuredly otherwise be jobless.") (internal quotations omitted); *Abolition Constitutionalism*, *supra* note 8, at 35 ("Prison expansion instead reflects a response to the needs of rising neoliberal racial capitalism that addresses growing socioeconomic inequality with punitive measures."); *see also* Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 57, 66–68, 73 (2015) (examining the "school-to-prison pipeline through a capitalistic lens, revealing that African American and Latino students expelled, suspended, or arrested in public schools are exploited by the prison industry").

22. *See* Steven L. Nelson & Ray Orlando Williams, *From Slave Codes to Educational Racism: Urban Education Policy in the United States as the Dispossession, Containment, Dehumanization, and Disenfranchisement of Black Peoples*, 19 J. L. SOC. 82, 85 (2019) (discussing how "urban education policy has led to the dispossession, containment, dehumanization, and disenfranchisement of Black people in the United States").

of Reconstruction.[23] In this article, we show that recognition of such a right is legally plausible in terms of constitutional precedent and that its effectuation is institutionally practical with regard to federalism and the judicial requirement of manageable standards. Above all, we believe that the positive vision of equal liberty encompassed within such a right could be meaningful as support for social mobilization that is the authentic driver of change. Recognizing the skepticism that movement groups have of constitutional rights,[24] we nevertheless urge that rights, reimagined within the abolitionist framework, hold significance for social campaigns doing anti-racist, redistributive work.[25]

Part I of this article sketches out earlier advocacy efforts to secure a right to education under the Equal Protection Clause of the federal Constitution and the turn over the last generation to state constitutional approaches. State courts have given substantive content to state constitutional education rights, with some emphasizing the development of capabilities that can lead to human flourishing, and a small number recognizing that the withholding of adequate public schooling while enforcing compulsory education laws interferes with a child's liberty.

Part II provides political and social context for the legal argument that follows by surfacing the ways in which Black, Brown, and poor children have been locked into inadequate carceral schools, but locked out of politics to change conditions in those schools. This Part contrasts the vision of edu-

23. Abolitionists have different orientations towards the state. Some strands of abolitionist thought see the carceral state as indispensable to and co-constitutive of the state. GARRETT FELBER, THOSE WHO KNOW DON'T SAY: THE NATION OF ISLAM, THE BLACK FREEDOM MOVEMENT, AND THE CARCERAL STATE 195 n.11 (2020) ("The distinction between carceral state and nation-state may be itself overly semantic.") (collecting sources). Because we advance a constitutional theory, we necessarily, albeit implicitly, rely here on a conception of abolition that is not anti-statist. We see this approach as aligned with a significant strand of abolitionist organizing, as discussed *infra* Section IV(D), which argues for state provision under an "invest-divest" framework. The authors thank Leila Raven for raising this point.

24. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409 (2019) (observing that the movement for criminal law reform "has largely refrained from fighting to strengthen preexisting rights or demanding legal recognition of new ones"). For a discussion of contemporary abolitionist movement demands in historical perspective, which eschews constitutional claims as a vehicle for Black liberation, *see* AirGo Radio, *Episode 225—The Abolition Suite Vol. 4: Robin D.G. Kelley* (July 19, 2020), https://airgoradio.com/airgo/2020/7/19/episode-255-the-abolition-suite-vol-4-robin-dg-kelley.

25. Roberts argues for "instrumentally using the Constitution to build a society based on principles of freedom, humanity, and democracy" by hearkening to interpretive moves made by slavery abolitionists:

> Just as antebellum abolitionists broke from the dominant interpretation of the Constitution as a proslavery document, so too prison abolitionists need not be shackled to the prevailing constitutional jurisprudence in advancing the unfinished freedom struggle. . . . Abolition constitutionalism, unlike other constitutional fidelities, aims not at shoring up the prevailing constitutional reading but at abolishing it and remaking a polity that is radically different.

Abolition Constitutionalism, *supra* note 8, at 105, 109–10.

cation advanced by abolitionists during the First Reconstruction—in which robust public education was seen as critical to securing meaningful freedom after emancipation—with efforts of those who sought to undermine emancipation and reconstitute a racial caste system after adoption of the Thirteenth and Fourteenth Amendments.[26]

Part III sets out a liberty-based approach to a federal right to quality public schooling, building on the traditional due process guarantee that the state may not confine a person without a substantial justification related to that confinement. Despite that guarantee, Black, Brown, and poor students are compelled to attend, upon pain of legal sanction, public schools that do not educate and that are physically and psychologically harmful to these children. We show that in contexts of involuntary confinement, a violation of a person's liberty interest may serve as the source of the government's duty to provide the goods and services that justify the confinement.

Working within the frame of abolition constitutionalism, we argue that the traditional guarantee of equal liberty is violated when the content and conditions of public schooling arbitrarily relegate one group of children, who are Black, Brown, and/or poor, to sub-standard and unsafe schools that subject the children to persistent structural disadvantage. In our view, such a system unconstitutionally perpetuates the very kind of racial and class caste that the Fourteenth Amendment was aimed at abolishing. Affording the children access to an education that achieves only basic literacy will not remedy the constitutional violation but rather entrench the harm by perpetuating the children's lifelong confinement and continuing their exploitation as low-wage labor in the prevailing racial capitalist regime. The remedy, instead, must recognize that even a minimally adequate education is one that encourages the children's flourishing as an aspect of their equal liberty. If the state cannot provide the children with opportunities for a quality education in their "assigned" school district, then the remedy must include mobility strategies that effectively release the children from the terms of confinement and allow them to transfer to public schools elsewhere where quality education is in fact provided.

26. Our invocation of the "anti-caste principle" draws on a tradition of legal argument, reflecting the fact that the anti-caste principle is well-enshrined in legal scholarship and finds support in Supreme Court case law. Its use here, however, is not an embrace of the sociological and historical claims associated with caste-based analysis of U.S. history and political economy. In that sense, we follow Dorothy E. Roberts' call to embrace "instrumental use" of constitutional concepts. *See Abolition Constitutionalism*, *supra* note 8, at 109. Although the anti-caste principle informed the Reconstruction amendments, some scholars have criticized a broader use of "caste" to explain issues of racism and inequality, emphasizing instead "the importance of social and economic class." Charisse Burden-Stelly, *Caste Does Not Explain Race*, BOST. REV. (Dec. 15, 2020), https://bostonreview.net/race/charisse-burden-stelly-caste-does-not-explain-race; *see also* Hazel V. Carby, *The Limits of Caste*, LOND. REV. BOOKS (Jan. 21, 2021), https://www.lrb.co.uk/the-paper/v43/n02/hazel-v.-carby/the-limits-of-caste.

Finally, in Part IV, we connect the legal argument with theories of social mobilization, and respond to criticisms mounted from different political quarters of law, lawyer, and court-based reform, and then briefly conclude.

I. ADVOCACY EFFORTS TO SECURE A FEDERAL RIGHT TO EDUCATION

Establishing a federal constitutional right to education has long proved elusive despite persistent advocacy,[27] elegant scholarship,[28] and public mobilization.[29] To be sure, the Equal Protection Clause of the Fourteenth Amendment provides some protection of a child's access to public schooling. Famously, *Brown v. Board of Education* held that a state may not constitutionally segregate children in public schools on the basis of their race.[30] Later, *Plyler v. Doe* invalidated a state's complete withholding of public schooling based on a child's parent's immigration status.[31] The Court acknowledged in *Plyler* that public schooling, given its "fundamental role in maintaining the fabric of our society," is not "merely some government 'benefit' indistinguishable from other forms of social welfare legislation."[32] Although the Court stopped short of declaring education a fundamental right under the federal Constitution, it explicitly recognized that the state's arbitrary withholding of public schooling from certain groups violated the anti-caste principle located at the core of the Equal Protection Clause of the Fourteenth Amendment.[33]

Nevertheless, in between these decisions came two others that significantly blunted the Equal Protection Clause as the basis for a federal right to education. The first was *San Antonio Indep. School Dist. v. Rodriguez*, holding that disparities in funding across school districts did not deny equal protection to children in low-wealth districts.[34] In *Rodriguez*, the Supreme Court considered a challenge under the Equal Protection Clause to Texas's public education financing scheme, which relied on local property tax reve-

27. Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755 (2007–2008) (reviewing efforts to establish such a right).

28. *See infra* notes 83–86 and accompanying text.

29. Joshua Clark Davis, *The Black Freedom Struggle of the North*, AF. AM. INTELLECTUAL HIST. SOC. (Aug. 20, 2020), https://www.aaihs.org/the-black-freedom-struggle-of-the-north.

30. *Brown v. Board of Educ., Shawnee Co., Kan*., 347 U.S. 483 (1954). *See also Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding racially segregated public schools violated federal due process protections).

31. *Plyler v. Doe*, 457 U.S. 220 (1982).

32. *Id.* at 221, 244.

33. *Id*. at 230.

34. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

nues and resulted in massive inter-district resource disparities.[35] The Court found that strict scrutiny did not apply because no fundamental right was at issue,[36] reasoning, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[37] Instead, the Court looked to whether "there is a right to education explicitly or implicitly guaranteed by the Constitution."[38] Finding no such right, the Court concluded that the claim did not fall under the "fundamental rights" branch of equal protection analysis.[39] In particular, the Court rejected the plaintiffs' "nexus" theory, which argued that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."[40] *Rodriguez* left open whether the federal Constitution protects a right to a minimum education,[41] but the Court's later seemingly narrow holding in *Plyler*—limiting the discussion to a complete withholding of education because of immigrant status—seemed to dim the likelihood of an equality challenge to inadequate public schooling.[42] The second decision was that in *Milliken v. Bradley*,[43] holding that although the Detroit, Michigan public school system was illegally segregated on the basis of race, a multi-district desegregation remedy was constitutionally impermissible absent evidence that school district boundaries had been established "for the purpose of creating, maintaining, or perpetuating segregation of races."[44] These two deci-

35. *Id.* at 8–17.

36. Notably, the lower court had determined that strict scrutiny was called for because a fundamental *interest*—education—was at issue. *See Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W.D. Tex. 1971). The majority of the Court, by contrast, looked for the existence of a fundamental *right*. Both dissents pointed out that the majority transformed the Warren Court's concept of "fundamental interests" into a limited (unwarrantedly so) concept of "fundamental constitutional rights." *Rodriguez*, 411 U.S. at 98–102 (Marshall, J., dissenting); *id.* at 62 (Brennan, J., dissenting).

37. *Id.* at 30.

38. *Id.* at 33–34.

39. *Id.* at 35.

40. The Court both cast doubt on the theory itself, stating it was difficult to perceive "logical limitations" to its scope, and also found that the Texas system provided the "basic minimal skills" needed for the meaningful exercise of speech and voting rights. *Id.* at 36–37.

41. *See Papasan v. Allain*, 478 U.S. 265, 284 (1986) ("The [*Rodriguez*] Court did not . . . foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].'"); *see also Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 note 1 (1988) (Marshall, J., dissenting) ("The Court . . . does not address the question whether a State constitutionally could deny a child access to a minimally adequate education."). The Court could, of course, revisit and overturn cases rejecting the general right, or it could take the path left open by its prior opinions and affirm the existence of a right to a minimally adequate education (such as one that provides access to literacy).

42. *Plyler*, 457 U.S. at 36–37.

43. *Milliken v. Bradley*, 418 U.S. 717 (1974).

44. *Id*. at 748.

sions—combined with the Supreme Court's increasing rejection of equality-based claims—convinced many advocates to shift the focus of their litigation to state courts and to assert claims that relied on rights to education explicitly set out in state constitutions.[45]

Beginning with *Serrano v. Priest*,[46] which was pending before California courts at the time *Rodriguez* was decided, some state courts interpreted state constitutional equality guarantees as staking out broader protections than those the Supreme Court was willing to recognize. In an opinion that predated *Rodriguez*, the California Supreme Court had found that the California education financing scheme violated both state and federal equal protection guarantees.[47] When the case returned to the California high court after *Rodriguez*, the defendants argued that *Rodriguez*, which abrogated the federal constitutional holding, compelled revisiting the state constitutional holding given the reasoning of the pre-*Rodriguez* decision.[48] The plaintiffs responded not only by arguing that the state equal protection holding survived *Rodriguez* unscathed, but also that even under *Rodriguez*'s methodology for identifying fundamental rights, the requisite "nexus" to constitutional rights existed because of various positive rights under the state constitution.[49] The California court held:

> [F]or purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest. Because the school financing system here . . . involve[s] a suspect classification [i.e., wealth], and because that classification affects the fundamental interest of the students of this state in education, we have no difficulty in concluding . . . that the school financing system before us must be examined under our state constitutional provisions with that strict and searching scrutiny.[50]

In reaching this result, the California Supreme Court made clear that it would not employ the *Rodriguez* Court's methodology for identifying fundamental rights.[51]

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45. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332 (2006) ("In recent decades, the educational plight of disadvantaged schoolchildren, once an absorbing concern of federal constitutional law, has managed to draw sustained legal attention mainly in the state courts.").

46. 18 Cal.3d 728 (1976).

47. *Serrano v. Priest*, 5 Cal.3d 584 (1971).

48. *Serrano v. Priest*, 18 Cal.3d 728, 763 (1976).

49. The court cited Cal. Const. Art. IX, § 1 (knowledge); Art. IX, § 5 (establishing schools); Art. XVI, § 8 (funding schools).

50. *Serrano*, 18 Cal.3d at 765–66.

51. The California court stated:

In addition to classifying education as a fundamental interest, *Serrano* hinted at, but did not develop, a functional understanding of fundamental rights by linking the provision of certain public goods to the maintenance of a "free and representative form of government." A decade later, a functional approach—one centered on the capabilities education should help develop in a young person—rose to prominence following a decision of the Supreme Court of Kentucky. In *Rose v. Council for Better Education*,[52] a case brought under the Kentucky Constitution's education clause,[53] the Kentucky Supreme Court identified education as a fundamental right and outlined "seven capacities" that an education, to be "adequate," must help a child develop:[54]

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[55]

> [W]e are constrained no more by inclination than by authority to gauge the importance of rights and interests affected by legislative classifications wholly through determining the extent to which they are 'explicitly or implicitly guaranteed' [citing *Rodriguez*] by the terms of our . . . state Constitution. In applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered 'fundamental.'

Id. at 767–68. The Court acknowledged in a footnote that the inclusion of a right in the state constitution was relevant to, but not dispositive of, the question whether the right should be considered fundamental. *Id.* at 764.

52. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

53. Ky. Const. § 183 (requiring the legislature to "provide an efficient system of common schools throughout the state.").

54. Although the constitution used the phrase "efficient system," the court credited expert testimony that "efficient" in this context meant, *inter alia*, "adequate." *Rose*, 790 S.W.2d at 211.

55. *Id.* at 212. *Rose* built on a similar list articulated by the West Virginia Supreme Court—which the Kentucky court quoted to show that "Courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system," *id.* at 210—but it was not until the Kentucky Supreme Court's opinion in *Rose* that this approach was widely adopted by state high courts. *See Pauley v. Kelly*, 162 W.Va. 672 (1979).

Emphasizing that "*every child*[] . . . must be provided with an equal opportunity to have an adequate education,"[56] the court drew on Kentucky's constitutional convention to link equality to the positive right to an education that promotes human flourishing along the seven dimensions that it outlined.[57]

The *Rose* conception of the education right—public schooling sufficient to encourage human flourishing, and not simply to teach minimal literacy—influenced succeeding state court litigation. As Scott Bauries has documented, the decision was "adopted or relied on in nearly every other successful state court case for . . . two decades nationwide, regardless of differences in the substantive language of the education clauses among the states."[58] Notably, some states adopted the *Rose* capacities list wholesale despite state constitutional education clauses that bear little in common with Kentucky's clause.[59] Indeed, even some states that did not adopt *Rose*'s capacities approach nevertheless determined that education, to be minimally adequate, must provide more than the opportunity to obtain basic literacy.[60]

The consensus view of these state court efforts, now more than a generation old, is that they bore legal fruit, in the sense of producing litigation victories in a majority of the states, with courts recognizing that claims under state education clauses are justiciable,[61] and that they provide the basis

56. *Id.* at 211 (emphasis in original).

57. *Id.* at 205–06.

58. Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 760 (2012).

59. Consider Massachusetts, which adopted the *Rose* criteria. *McDuffy v. Sec'y Exec. Office Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) ("The guidelines set forth by [*Rose*] fairly reflect our view of the matter and are consistent with the judicial pronouncements found in other decisions."). Yet Massachusetts's constitutional education clause has little in common, textually or historically, with that of Kentucky's constitution. Mass. Const. Pt. II, Ch. 5, § 2 ("Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns[.]"). Other states have adapted it. *See, e.g., Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) ("We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.").

60. *See, e.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 906 (2003) (reversing intermediate appellate court holding that education clause did not demand that public schooling provide "anything more than 'the ability to get a job, and support oneself, and thereby not be a charge on the public fisc' because "[m]ore is required," including "skill in communication and the use of information, and the capacity to continue to learn over a lifetime").

61. However, concerns about justiciability persist in some state courts, and have become more pronounced given the protracted nature of reform litigation. *See, e.g.*, Joshua E. Weishart, *Aligning*

for ordering states and localities to improve public schooling for the plaintiff-children.[62] These lawsuits illustrate that notwithstanding federal court defeats, social movements continued to leverage power from the language of constitutional rights, even when those rights were localized in state constitutional texts.[63]

Significantly, the state court education lawsuits expanded the notion of rights in a number of important respects. First, against arguments that social equality claims are non-justiciable, these state courts acknowledged and acted on their institutional competence to enforce affirmative claims to government-provided services, while acknowledging the admittedly complicated separation of powers issues that the claims present. In conceiving of the content of the right to education, state courts emphasized not simply the acquisition of minimal skills needed for majoritarian participation, but rather, access to multiple capabilities that look to a broader conception of individual autonomy at the core of a person's liberty interest. One state court even held a state's failure to provide quality schooling to children whose attendance the state compels violates a traditional notion of liberty at the core of due process.[64] As the Alabama trial court recognized in its 1993 decision in *Alabama Coalition for Equity v. Hunt*, a child's liberty interest is violated when the state mandates the student's attendance at a public school that fails "to provide an adequate education."[65] The court reasoned:

> It is well-settled in this state that when the state deprives citizens of liberty for the purpose of benefiting them with a service, due process requires that the service be provided to them in an adequate form. . . .
>
> The state of Alabama deprives students of their liberty by requiring them to attend school under penalty of law. . . . [T]he purpose of depriving students of their liberty by mandating school attendance is to educate them. . . . [C]ompulsory attendance places a limitation on individuals' liberty and

Education Rights and Remedies, 27 KAN. J.L. & PUB. POL'Y 346, 347 (2018); Julia A. Simon-Kerr & Robyn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83 (2010).

62. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 30 (2018) (identifying wins in state constitutional challenges in 27 states) [hereinafter 51 IMPERFECT SOLUTIONS].

63. Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1977 (2008), *quoting Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

64. *Opinion of the Justices*, 624 So. 2d 107 (Ala. 1993) (attaching the unpublished lower court decision *Alabama Coalition for Equity v. Hunt* (Circuit Ct. Montgomery Co. 1993) as an appendix to an advisory opinion issued to the Alabama state legislature regarding school funding).

65. *Id.*, Appendix at 161–62. *See also King v. State*, 818 N.W.2d 1, 66 (Iowa 2012) ("[B]ecause education is compulsory, it involves liberty and its deprivation triggers a due process right that the infringement of liberty be reasonably related to the intended purpose, namely, education.") (Appel, J., dissenting).

> thus, as a matter of fairness, the state ought to have to provide an adequate education.
>
> Plaintiffs have made a clear showing in this case that the education that they are receiving is not adequate; it falls short in facilities, staff, curriculum, textbooks, supplies, special education, and other areas. . . . [T]he inadequate education that plaintiffs are receiving does not justify the deprivation of their liberty. If the state is to continue to make education compulsory and, thereby, to deprive children of their liberty, due process requires that those children be accorded an adequate education.[66]

In reaching this conclusion, the court primarily relied on the Alabama Constitution, supplemented by a consideration of federal due process jurisprudence.[67]

Further, at least some state courts acknowledged and even highlighted the deep racial impacts of public school inadequacy and found state liability without any showing of a current intent to discriminate (as required under federal equality doctrine). In a landmark decision, the Connecticut Supreme Court recognized that public school segregation violates a child's right to equal protection whether it has occurred *de jure* or exists *de facto*.[68] Finally, state education litigation gave serious attention to the importance of community-based approaches in devising a judicial remedy, endorsing democ-

66. *Id.*

67. *Id.* at 161 note 61 (noting in a footnote that "the Alabama Supreme Court has expressly adopted a standard of more rigorous judicial scrutiny in state substantive due process review than that applied under the federal due process clause"). The court also differentiated the facts before it from those of *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992), in which the Third Circuit rejected the existence of a "special relationship" between a child and her public school. The Alabama court emphasized that, unlike in *D.R.*—an action under 42 U.S.C. § 1983 against school officials who failed to intervene to prevent the gang-rape of two girls on campus, despite their knowledge that the rapists had engaged in a course of sexually harassing conduct—in this case "the harm suffered by Alabama schoolchildren is being inflicted by the state itself." *Opinion of the Justices*, 624 So. 2d at 161 note 63. Alabama's Supreme Court later retreated from the education finance area altogether. *See Ex parte James*, 836 So. 2d 813 (Ala. 2002) (dismissing, primarily based on remedial concerns, school finance litigation as nonjusticiable).

Most state high courts have not addressed this theory. Aside from Alabama, two state courts rejected liberty-based substantive due process challenges, *see Lewis v. Spagnolo*, 710 N.E.2d 798, 812 (Ill. 1999); *King*, 818 N.W.2d at 31–34, while at least one other state court has indicated that such a challenge would be viable if (and only if) students are "not receiving . . . *a basic adequate education*." *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1150 (Okla. 1987). The theory also has been advanced in some cases that have settled on terms favorable to the plaintiffs. *See, e.g.*, *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1289 (N.D. Ga. 2006) (describing "sweeping relief" afforded by the consent decree entered pursuant to a settlement), *rev'd on other grounds* 559 U.S. 542 (2010) (vacating attorney's fee award); *see also Kenny A. ex rel. Winn v. Perdue*, 2003 WL 25682412 (N.D. Ga.), Complaint at ¶¶ 194–96 (setting forth substantive due process claims).

68. *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996).

ratizing strategies that actively engaged parents and other stakeholders in the development of alternative school plans.[69]

Despite these advances, Black, Brown, and poor children continued and continue to be detained in inadequate and harmful schools and prevented under threat of criminal sanction to access educational opportunities in public schools made available to advantaged students elsewhere in the state.[70] Establishing a federal constitutional right—one that would express a national commitment to quality education for all—thus has remained an active aspiration, motivating new advocacy efforts,[71] notwithstanding federal doctrinal barriers that exist from three converging directions and would seem to block recognition of such a right.

First, existing jurisprudence under the federal Equal Protection Clause makes it difficult if not impossible to redress racial disparities without a showing of the government's current intent to discriminate on the basis of race. As Reva Siegel has bluntly put it, "equal protection no longer protects"; to the contrary, the judicially-developed doctrine permits "the state to act in ways that perpetuate, or even aggravate, the racial stratification of American society."[72] The racial effects of the placement of school district boundaries, property tax funding systems, and state formulas to apportion educational funding, although well-documented, thus have seemed impervious to challenge under existing Fourteenth Amendment precedent.[73]

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69. *See, e.g.*, Helen Hershkoff, *School Finance Reform and the Alabama Experience*, *in* STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY (Marilyn J. Gittell, ed., 1998).

70. Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1844 (2007) (stating that "neither the equality nor the adequacy 'wave' of litigation has produced the desired result even on the heels of ostensible judicial victory").

71. *See* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1062 (2019) (reviewing recent litigation).

72. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). *See also* Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 491 (2014) ("Equal Protection clause jurisprudence has retreated from the early commitment to equal access to high quality, public education that the Court demonstrated in *Brown v. Board of Education*."); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2358–59 (2006) (stating that equal protection doctrine fails to distinguish between a racial classification "that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination"), *quoting Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (citation omitted).

73. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 143–44 (1995) (describing constitutional litigation as "disappointing" in not addressing "disparities . . . that result from reliance on local propterty taxation"); *see also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) ("[T]he law has . . . affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no oppor-

Second, casting the equality claim in terms of poverty or economic status would fare no better and in some ways even worse. Indeed, the argument to many commentators has appeared to be a non-starter: absent recognition of a fundamental right to education, the Equal Protection Clause alone would not redress wide disparities in the quality of public schooling attributable to the wealth of the communities in which students live.[74] The Court has refused to treat poor persons as members of a group in need of heightened protection, and its application of rationality review when assessing laws affecting the poor is thought to be inevitably fatal to a litigant's claim.[75]

Third, it is not clear that winning on equality grounds would actually improve educational conditions for Black, Brown, and poor children. To be sure, in the forty years since Peter Westen referred to the "empty idea of equality,"[76] some scholars have offered substantive principles to fill the gap,[77] and tried to redirect attention to specific conditions of relative equality that could give rise to posterior claims of arbitrary state action.[78] Nevertheless, the Court has declined to read a fundamental right to an adequate education into its conception of equality, so that an equality claim, even if successful, would permit remedies that treat the favored group on a par with the disfavored group—what is known as ratcheting down.[79] Of course, ratcheting down is not always politically viable, but its availability as a doctrinal option allows the Court to stake out a minimalist approach that is said to meet concerns of institutional capacity,[80] as well as fears of community backlash (meaning, resistance by white and affluent persons and groups)[81] and a purported need to quell "pluralist anxiety."[82]

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tunities for decent housing, and have very little political power, without any violation of antidiscrimination law.").

74. *See* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 40–46 (2018) (describing how class-based constitutional protections are limited unless linked to a fundamental right).

75. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1283 (1993) (explaining that "[f]unctionally, . . . the Court erected what appears to be an insurmountable presumption that political decisions concerning social welfare issues are constitutional").

76. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

77. *See, e.g.*, Kent Greenwalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

78. *See* Anthony D'Amato, *Is Equality a Totally Empty Idea?*, Faculty Working Papers No. 115 (2010), http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/115.

79. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698, 198 L. Ed. 2d 150 (2017) (explaining that equal protection violations can be remedied by "withdrawal of benefits from the favored class") (internal citation omitted). *See also* Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?,"* 1972 WASH. U. L. Q. 405, 419 (1972) ("It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one.").

80. *See infra* notes 313–348 and accompanying text.

81. Frank Brown, Brown *and the Politics of Equality*, 26 URB. REV. 4 (1994).

82. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("The jurisprudence of the United States Supreme Court reflects . . . pluralism anxiety.").

Against these obstacles, scholars have looked beyond the Equal Protection Clause for other doctrinal sources that could support a federal right to education. These include the First Amendment,[83] the Citizenship Clause,[84] substantive due process,[85] and originalist arguments that pay obeisance to the Court's dominant interpretive approach.[86] And so it seemed a banner day when, on April 23, 2020,[87] a divided panel of the Sixth Circuit Court of Appeals recognized "a basic minimum education" as a "fundamental right" under the federal Constitution.[88] In reaching this conclusion, the appeals court affirmed the district court's dismissal of the plaintiff's claim under the federal Equal Protection Clause.[89] Acknowledging that the Supreme Court's earlier cases gave them "guidance but no answers" as to whether education is an unenumerated but fundamental right,[90] the circuit court instead applied the "substantive due process framework" of *Glucksberg* and *Obergefell*[91] to conclude that the right to education is a fundamental right, "narrow in scope," and one that "only guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system."[92] The Sixth Circuit also considered whether the children suffered a different violation of due process—that they suffered a violation to "the right to freedom of movement and freedom from state custody" because state laws compel their attendance at public schools that are "schools in

83. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the United States Constitution*, 86 NW. U. L. REV. 550 (1982).

84. *See, e.g.*, Liu, *supra* note 45, at 396–99.

85. *See, e.g.*, Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 972–77 (2016); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013).

86. Derek W. Black, *Implying a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135, 155–58 (Kimberly Jenkins Robinson, ed., 2019).

87. *See* Mark Walsh, *U.S. Appeals Court Recognizes a Federal Right of Access to Literacy*, SCHOOL LAW (Apr. 23, 2020) (quoting Justin Driver, that the Sixth Circuit ruling is "the most momentous circuit court decision in the field of education in decades"), https://blogs.edweek.org/edweek/school_law/2020/04/federal_appeals_court_recognizes.html.

88. *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reversing in part and remanding Gary B. v. Snyder*, 313 F. Supp. 3d 852 (E.D. Mich. 2018). The decision upheld the prior ruling that the plaintiffs failed to "adequately plead their equal protection and compulsory attendance claims." *Id*. at 619.

89. *Gary B.*, 957 F.3d at 633 (explaining that the complaint did not adequately plead an equal-protection claim, "regardless of the level of scrutiny," because it failed to allege "any disparity in the state's allocation of resources between their schools and others").

90. *Id*. at 648.

91. *Id*. at 642 (relying on *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Obergefell v. Hodges*, 576 U.S. 644 2584 (2015)). The circuit court also looked to "the reasoning" of *Rodriguez* and *Plyler*. *See id*. (relying on *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), and *Plyler v. Doe*, 457 U.S. 220 (1982)).

92. *Id*. at 659.

name only."[93] Observing that the claim "appears to have strong support in the law," the court nevertheless held that the plaintiffs "fail[ed to] provide information about the extent or nature of the restraint on their liberty,"[94] and remanded, allowing for amendment of the complaint.

Within a month of the decision, the parties entered into a settlement agreement, contemplating "dismissal of the underlying action" in exchange for institutional reforms that include increased funding for literacy programs and the establishment of an equity task force to consider and recommend additional state-level reforms.[95] And in that same period, following a *sua sponte* request of a member of the *Gary B. en banc* panel, the Sixth Circuit vacated the decision and judgment and stayed the mandate.[96] Whether the Sixth Circuit, or any federal court,[97] will soon recognize education as a fundamental federal right and a part of a person's basic liberty, or provide redress for gross racial and class inequalities in the provision of educational opportunities within and across school districts, remains an open and vital question.

II. CONTEXTUALIZING THE ARGUMENT: LOCKED INTO CARCERAL SCHOOLS AND LOCKED OUT OF POLITICS

In this Part, we contextualize our argument by showing how race and class have structured American public schooling from its earliest days. In foregrounding these policies and their consequences, we explain how the resulting system relies on coercion and compulsion by either withholding education entirely or requiring children to attend sub-standard facilities. Understanding that schools have the potential to detain children while both providing little of the promised pedagogic benefits, and disempowering the communities in which they operate, is not a new gloss on the history of U.S. education. Indeed, the encroachments of the prison-industrial complex into public schools—and these schools' reciprocal engagement with the criminal punishment system—are so manifest as to have a name: the

93. *Id*. at 638 (internal quotations omitted).

94. *Id*. at 638–41.

95. *See* Terms for Settlement Agreement and Release Between All Plaintiffs and the Governor of the State of Michigan in *Gary B., et al. v. Whitmer, et al.*, Settlement Term Sheet (May 13, 2020), http://www.publiccounsel.org/tools/assets/files/1382.pdf.

96. *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

97. *See* Class Action Complaint, *Cook et al. v. Raimondo*, 1:18-cv-00645, ECF No. 1 (D.R.I. Nov. 28, 2018) (seeking declaratory and injunctive that plaintiffs have a federal right to education). *See also Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020) (reversing dismissal of complaint filed in 2017 alleging that the current version of the Mississippi Constitution violates the "school rights and privileges" condition of the Mississippi Readmission Act).

school-to-prison pipeline.[98] By design and effect, public schools for Black, Brown, and poor children have transformed into extensions of the carceral state and become instruments for maintaining and reproducing racial capitalism.

This Part does not purport to present a comprehensive account of public schooling and its role in racial and class control. But if the project of abolition constitutionalism is to "remak[e] a polity that is radically different,"[99] it is important to acknowledge in open and sober terms what needs to be changed. Our project carries forward the best aspirations of the federal Constitution and its promise of equal liberty, but contemplates a break with a present and past—stretching back to Reconstruction—in which public education has been used to perpetuate the unequal and racial distribution of liberty in the United States

A. PUBLIC SCHOOLS AND THE POLITICS OF RACIAL AND CLASS EXCLUSION

"The Constitution promises liberty to all within its reach," Justice Kennedy wrote in the Court's landmark decision recognizing marriage equality,[100] but that promise was empty for the enslaved—to borrow from Kenneth Karst, slavery was "[t]he most flagrant violation of the American tradition of equal liberties."[101] The withholding of education—and the criminalization of providing education to enslaved Black people—was a critical weapon in maintaining the institution. Beginning with South Carolina's Negro Act of 1740, colonies adopted laws to ban literacy of enslaved Black people; indeed, after the Nat Turner Rebellion, Virginia made it a capital offense to violate the act.[102] By the time of the Civil War, every state except Tennessee had outlawed the education of enslaved Black people.[103] The southern plantation oligarchy understood denial of education as central to the project of maintaining the empire of slavery.[104] W.E.B. Du Bois later

98. *See* Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009) ("The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system.").

99. *Abolition Constitutionalism*, *supra* note 8, at 110.

100. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

101. Kenneth Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 104 (2007).

102. *See* Birgit Brander Rasmussen, *"Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act*, 125 PMLA 201 (Jan. 2010).

103. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–77, at 246 (2d ed. 2015) [hereinafter AMERICA'S UNFINISHED REVOLUTION].

104. Grey Gundaker, *Hidden Education Among African Americans During Slavery*, 109 (7) TEACHERS COLLEGE REC. 1597 (2007) (describing white fears about educating Black people after slave revolts).

emphasized that the laws criminalizing the education of Black people were "explicit and severe."[105] Although Black people undertook great risks to secure as much education as possible,[106] 90 percent of the adult Black population in the south was illiterate in 1860.[107]

The Thirteenth Amendment abolished slavery,[108] and emancipation transformed the terrain of struggle—but did not lessen its intensity—over education for Black people. From the outset of the Reconstruction era, Black people considered "education . . . [to be] central to the meaning of freedom."[109] This sentiment was shared by abolitionist officials in government. To Freedman's Bureau Commissioner Oliver Howard, for example, education was "the foundation upon which all efforts to assist the freedmen rested."[110] The demands of Black people for education drove the establishment of the public school system in the south,[111] and led to amendments of state constitutions to include authorization for public schools, which in some states, was a condition of readmission to the union.[112]

105. W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 638 (1935) [hereinafter BLACK RECONSTRUCTION].

106. *See* HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM 7–29 (2005) (discussing the small percentage of Black people who, "through ingenuity and wit," acquired basic literacy prior to the Civil War).

107. AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 247.

108. *But see* Joy James, *Introduction, Democracy and Captivity*, *in* THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, at xxii (Joy James ed., 2005) (referring to the carve-out that provides, "except as punishment for crime," as creating an "enslaving anti-enslavement narrative" such that the Thirteenth Amendment "ensnares as it emancipates").

109. AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 247; *see also* BLACK RECONSTRUCTION, *supra* note 105, at 641 ("[B]lack folk. . . connected knowledge with power [and] believed that education was the stepping-stone to wealth and respect, and that wealth, without education, was crippled.").

110. *Id.* at 339; *see also* BLACK RECONSTRUCTION, *supra* note 105, at 191–215 (describing the positions of Charles Sumner, Thaddeus Stevens, and other supporters of abolition democracy, including their commitment to education); *see also* THE EDUCATION OF BLACK PEOPLE, *supra* note **Error! Bookmark not defined.**, at 131 ("It is all well enough to talk about equality of human beings and their liberty to act; the real fact of the matter, as we have known for generations and as we are beginning to admit today, is that a man who does not have enough to eat or the clothing and shelter necessary for health, and who is uncertain as to how long his present meagre income is going to last, is not free, and cannot be called the equal of the man with sufficient and assured income and security of status").

111. BLACK RECONSTRUCTION, *supra* note 105, at 638 ("Public education for all at public expense, was, in the South, a Negro idea."); *see also id.* at 641; AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 340 ("Bureau schools [] helped lay the foundation for Southern public education").

112. *Id.* at 637–69 (describing state constitutional conventions and legislative efforts pertaining to education). *See Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020) (discussing readmission requirements with respect to public schooling).

Recognizing that the project of abolition-democracy posed the threat of permanently securing a radical redistribution of power,[113] the white south mobilized against education for Black people.[114] A study commissioned by President Andrew Johnson found that the white south was "almost as bitterly set against the Negro's having the advantage of education as it was when the Negro was a slave."[115] The backlash to Black people's education included not only direct acts of racial terrorism, such as the burning of independent and Bureau-supported school houses,[116] but also subtler forms of opposition and co-optation.

Some Reconstruction-era white southerners consciously pusued a strategy of using schools as an institution of coercive control, supportive of an emergent racial capitalist order that was adapted within an agrarian society and structured on the same racial hierarchies as pre-dated Emancipation. Wade Hampton III—a Confederate General and, later, financier of the Ku Klux Klan—proposed to establish a system of schools on plantations, and undertook to do so on his own plantation at personal expense.[117] He recognized that the plantation schoolhouse could be a tool of confinement and maintenance of class stratification by "fix[ing] the laborers to the soil . . . result[ing] in vast ultimate benefit to the landlord."[118] Or, as put more succinctly by a southern newspaper: a "freedman" should be taught "that he is *free*, but free only to labor."[119] This strategy and rhetoric reflected a recog-

113. BLACK RECONSTRUCTION, *supra* note 105, at 38 (finding that "the result was little less than phenomenal" whenever newly freed Black persons received "honesty in treatment, and *education*") (emphasis added).

114. Du Bois described the abolition-democracy as "based on freedom, intelligence and power for all." BLACK RECONSTRUCTION, *supra* note 105, at 182; *see also id.* at 25 ("[A]ll those who sincerely desire to make the freedman a freeman in the true sense of the word, must also be in favor of so educating him[.]").

115. Carl Schurz, *Report on the Condition of the South*, 39th Cong., 1st Sess., Senate Executive DocumentNumber2(Dec.1865), https://wwnorton.com/college/history/america9/brief/docs/Schurz_Carl_Report_on_the_Condition_of_the_South_1865.pdf; *see also* BLACK RECONSTRUCTION, *supra* note 105, at 132–36 (describing Schurz's report as "[t]he classic report on conditions in the South directly after the war").

116. C.W. Tebeu, *Some Aspects of Planter-Freedman Relations, 1865–1880*, 21 J. NEGRO HIST. 2, 139 (1939).

117. *Id.* at 138. He and others sought, without success, to obtain state funding for this model. *Id.*

118. *Id.* (quoting Hampton).

119. AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 321 (emphasis in original); *see also* SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 3 (2016) ("State violence alongside gendered forms of labor exploitation made the New South possible, not as a departure from the Old, but as a reworking and extension of previous structures of captivity and abjection[.]"); THE EDUCATION OF BLACK PEOPLE, *supra* note **Error! Bookmark not defined.**, at 122–23 ("The object of white labor was not the uplift of all labor; it was to join capital in sharing the loot from exploited colored labor. So we too, only half emancipated, hurled ourselves forward. . . . But white folk occupied and crowded these stairs.").

nition that schools could confine and discipline as well as emancipate.[120] Accordingly, then as now, the struggle over education was not only over access, but also whether the predominant function of the school would be to exercise coercive control or instead to develop the capacities of students.[121] On balance, moneyed interests that sought to maintain the existing racialized system as a source of cheap labor won out.[122] Thus, the education system's potential to serve as a tool of Black liberation was subverted from its inception.[123]

In envisioning the provision of education—within limits—as an instrument for subordinating and exploiting Black persons for their labor, rather than for achieving their equal liberty, southerners drew on a tradition with roots in the English and U.S. poor laws.[124] As Frances Fox Piven and Rich-

120. CARTER G. WOODSON, THE MIS-EDUCATION OF THE NEGRO 45 (1933) ("The education of the Negro, then, becomes a perfect device for control from without."); *see also id.* at 63 ("[T]he keynote in the education of the Negro has been to do what he is told to do. Any Negro who has learned to do this is well prepared to function in the American social order as others would have him.").

121. On the one hand, the white south struggled to reassert control. AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 321–22 ("No detail of blacks' lives seemed exempt from outside control."). At the same time, Black people struggled to erect independent institutions. *See, e.g.*, *id.* at 212–13 (describing "a desire for independence from white control" manifested in operation of schools, churches, and other public institutions "liberated from white supervision"); *id.* at 248 (quoting a member of an education society describing an autonomous school house as "the first proof of *independence*") (emphasis in original)).

122. WILLIAM WATKINS, THE WHITE ARCHITECTS OF BLACK EDUCATION: IDEOLOGY AND POWER IN AMERICA, 1865–1954 22–23 (2001) (tracing how "accommodationism"—a post-Civil War politics that saw subordination of Black people as "part of the natural order"—"shaped the sponsored education of Blacks in the United States" and pursued the "objective[] [of] a stable and orderly south where subservient wage labor and debt farming or share-cropping would provide the livelihood for Black Americans.") [hereinafter WHITE ARCHITECTS]; *see also* THE EDUCATION OF BLACK PEOPLE, *supra* note **Error! Bookmark not defined.**, at 97 ("The organized might of industry north and south is relegating the Negro to the edge of survival and using him as a labor reservoir on starvation wage."). For an early critique of the U.S. public school education for Black children that implicated capitalism, *see* DOXEY WILKERSON, THE HISTORIC FIGHT TO ABOLISH SCHOOL SEGREGATION IN THE U.S. (1954) ("Monopoly capital—which profits enormously from the Jim Crow system—[] understands the far-reaching implications of these school segregation cases."); Doxey Wilkerson, *The Ghetto School Struggles in Historical Perspective*, 33(2) SCI. & SOC. 130, (1969) ("The Negro's fight for education *per se*, is, of course, an integral and necessary part of his struggle to emerge from subordination in the society; and it contributes importantly to the over-all goal of full dignity and freedom and equality in American life. But that larger goal, along with its educational concomitants, cannot be won in isolation from progressive economic and political forces[.]"); *see also* Doxey Wilkerson, *Russia's Proposed New World Order of Socialism*, 10(3) J. NEGRO EDU. 387 (Fall 1955).

123. WHITE ARCHITECTS, *supra* note 122, at 182 ("The shaping of race relations was inextricably connected to Black education. The objective of the ruling order was to wed Constitutional freedom with social subservience. Freedom became the form, subservience the content.").

124. The English Poor Laws, with their emphasis on local assistance, provided the model for indigent relief in colonial America, and made residence within a community a primary determinant of eligibility for assistance. *See* William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 SAN FRAN. L. REV. 35, 40–41 (1996) (describing transportation of vagabonds and regulation of vagrants). The rules of settlement imposed strict restrictions on liberty, regulating mobility both within a town and from town-to-town and were enforced through various devices throughout the colonies during

ard Cloward have shown, there is a long history of "[r]elief arrangements . . . granting [assistance] on condition that [the recipients] behave in certain ways and, most important, on the condition that they work."[125] Consistent with the idea of "free[dom] only to labor,"[126] Piven and Cloward describe the establishment of schools "to teach pauper children to read and write" as part of the "effort . . . to redirect the employable poor . . . into the work force."[127] Piven and Cloward's analysis echoes that of Du Bois, who recognized the effort to subvert education as envisioned by abolition-democracy for the purpose of preparing a work force for menial jobs.[128]

Limiting the educational opportunity of Black children controlled not only their later access to higher wage jobs, property acquisition, and geographic mobility, but also to the franchise. Many states required a Black citizen to pass—usually with a 100 percent grade—tests that purported to assess the person's literacy skills as a condition of voting. Although the literacy requirement was race-neutral, in practice, white examiners used their discretion to waive requirements for white test-takers and to fail Black test-takers.[129] Some states even amended their constitutions to require the passing of the test as a condition of voting.[130] In 1898, the Supreme Court

different time periods. Intra-town restrictions typically regulated mobility by confining the poor to almshouses or workhouses, indenturing and apprenticing, the binding out of widows and other women as domestic servants, *see* MIMI ABRAMOWITZ, REGULATING THE LIVES OF WOMEN 86–87 (1988), or enslavement (or registration requirements for free people of color). *See* Quigley, *supra* note 124, at 70–71, 77–78. Inter-town restrictions depended on a mix of outlawry (vagrants and vagabonds were excluded or expelled), "warning out" rules, waiting periods to acquire residence status, and certificate systems that required a household wishing to relocate to certify that the town of origin would reimburse the receiving town for the cost of any prospective relief. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); *see also* DAVID J. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 24 (1971) (explaining that Delaware's settlement law required the stranger and the vagrant, whether able to work or disabled, "to post security or quickly leave the county under penalty of daily whippings until they did so"); Quigley, *supra* note 124, at 52 (describing the Pennsylvania certificate system); Stefan A. Riesenfeld, *The Formative Era of American Public Assistance*, 43 CAL. L. REV. 175, 219 (1955) (describing the certificate system of New Amsterdam prior to English colonial rule).

125. FRANCES FOX PIVEN & RICHARD CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 22 (1971) [hereinafter REGULATING THE POOR]; *cf.* AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 253 (describing Black southerners' desire for "assistance without control" in running schools).

126. *See supra* note 119 and accompanying text.

127. REGULATING THE POOR, *supra* note 125, at 22–23.

128. BLACK RECONSTRUCTION, *supra* note 105, at 697 ("An attempt was made through advocacy of so-called industrial education to divert the Negro schools from training in knowledge to training in crafts and industry. But . . . no effective industrial training was ever given in the Southern public schools, except training for cooking and menial service.").

129. *See* Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013), https://slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html.

130. *See* John Ray Skates, *The Mississippi Constitution of 1890, Mississippi History Now* (Sept. 2000), http://www.mshistorynow.mdah.ms.gov/articles/103/mississippi-constitution-of-1890.

upheld the literacy tests in Mississippi on the view that they were applied to both white and Black registrants, giving no weight to the fact that white officials administering the test did so in a biased way.[131] Together with the poll tax and property-ownership requirements, imposing these conditions on the right to vote proved to be a highly successful strategy of control: by 1940, only three percent of all eligible Black voters were registered to vote in the South.[132] The Voting Rights Act of 1965 restricted the use of literacy tests,[133] and the 1975 amendments broadened those protections to non-English speaking voters.[134] But by any measure, Black people remained locked out of politics,[135] and their children remained locked in inadequate schools under the combined weight of compulsory education laws and punishment for truancy.[136]

The story of the Ocean Hill-Brownsville education experiment dramatically illustrates this dynamic in the early post-*Brown* era even in the North. A decade after *Brown*, New York's schools were even more segregated than before 1954, in part because of organized backlash against integration from white community groups, with schools in poor Black neighborhoods remaining sub-standard.[137] The Ocean Hill-Brownsville experimental district, an effort to vest community control of schools in poor Black neighborhoods, was one response to sustained organizing around failing and unsafe schools in Black neighborhoods. The "genesis" of the Ocean Hill-Brownsville district was a New York City Board of Education (Board) public hearing in December 1966.[138] After Board President Lloyd Garrison refused to give the floor to a Black mother complaining of "ghetto"-like conditions in the schools, protests erupted, leading a frustrated Garrison to

131. *Williams v. Mississippi*, 170 U.S. 213 (1898).

132. STEVEN S. LAWSON, RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941 81 (1997).

133. CHANDLER DAVIDSON, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (2001).

134. *See generally* David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

135. *See* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. (manuscript at 18–19) (forthcoming 2021) (manuscript at 24–25) (on file with author) ("Punitive law enforcement practices in [race-class subjugated] neighborhoods become self-reinforcing, independent of crime rates, with a direct impact on political power. . . . The laws and everyday practices of policing preclude poor people of color from being full democratic subjects."); Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and American Democracy*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/.

136. Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1383 n.43 (1976).

137. JERALD PODAIR, THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS 21–25 (2003) [hereinafter STRIKE THAT CHANGED NEW YORK].

138. *Id.* at 71.

shut the meeting down.[139] Rather than depart, protesters occupied the Board's offices and anointed themselves the "People's Board of Education."[140] After a multi-day sit-in, Garrison ordered the arrest of the protesters, who were "carried out" by police while supporters looked on with signs that read, "Will Jail Help My Child To Read?"[141] Weeks later, Ocean Hill-Brownsville residents borrowed the "People's Board of Education" concept to constitute an "Independent School Board" as part of a boycott of their local school board in response to being locked out of governance by middle-class white people from a nearby neighborhood.[142] Begrudgingly, the Board and City government conceded that "without community control of education in [B]lack neighborhoods, there would be no peace in New York."[143]

With funding from the Ford Foundation and support from the Mayor, in 1967, the Board established a local Ocean Hill school board drawn from community residents to administer its own school district.[144] In 1968, the local board—which had clashed with both the Board and the 90-percent-white United Federation of Teachers (UFT) over its demand to control personnel, curricula, and finances—flexed its independence by ordering the transfer of 18 white teachers it regarded as opposing its agenda of autonomous control.[145] When the local board refused to back down and the City refused to force the issue, the UFT went on strike.[146] That fall, in the face of continuing strikes, the City took the Ocean Hill school district into a trusteeship, and the following year, the experimental district was terminated.[147] The experiment was short-lived and not to be repeated.

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139. *Id.* at 71–73.

140. STRIKE THAT CHANGED NEW YORK, *supra* note 137, at 72.

141. *Id.* at 72–73.

142. STRIKE THAT CHANGED NEW YORK, *supra* note 137, at 73.

143. *Id.*

144. Jerald Podair, *"White" Values, "Black" Values: The Ocean Hill-Brownsville Controversy and New York City Culture, 1965–1975*, 59 RADICAL HIST. REV. 36, 38 (1994) [hereinafter *Ocean-Hill Brownsville Controversy*].

145. *Id.* at 39–40; *see also* STRIKE THAT CHANGED NEW YORK, *supra* note 137, at 1–5.

146. *Ocean-Hill Brownsville Controversy*, *supra* note 144, at 39–40.

147. *Id.* In this sense, Ocean Hill-Brownsville followed the trajectory of other Ford Foundation-funded projects of this era. For example, in 1965, the Ford Foundation cut off support for Mobilization for Youth (MFY), which operated on Manhattan's Lower East Side, after MFY and its offshoot, Mobilization of Mothers, began pressing more radical demands related to education using strikes, boycotts, and protests, generating what the Ford Foundation regarded as negative publicity. *See* Sam Collings-Wells, *Developing Communities: The Ford Foundation and the Global Urban Crisis, 1958–66*, 2020 J. GLOBAL HIST. 1, 16–17 (2020). Thereafter, the Ford Foundation turned to funding policing, including in provision of key support to "Broken Windows" policing. *See* Sam Collings-Wells, *From Black Power to Broken Windows: Liberal Philanthropy and the Carceral State*, J. URBAN HIST. ONLINEFIRST (Sept. 18, 2020), https://journals.sagepub.com/doi/10.1177/0096144220956617.

B. CONFINEMENT IN SCHOOLS: TRUANCY, CRIMINALIZATION, AND RACIAL DISPARITIES

In the ensuing decades, an understanding of schools as confinement, backed up through criminal enforcement, has become even more salient: in addition to being compelled to attend failing schools while being locked out of politics,[148] the tools used to confine students in schools have become more biting, and the schools themselves have become much more carceral.[149]

States confine students in schools by means of compulsory attendance laws. These laws require children of certain ages to be physically present in state-run facilities (subject to specified exceptions) for a certain number of days each year, and for a certain term of years. Failure to comply with these laws subjects both children and parents to a range of penalties.

Massachusetts passed the first compulsory attendance law in 1852,[150] and all other states have since followed suit. The 1852 Massachusetts law required that persons between the ages of eight and 14-years-old be in a place of learning for at least 12 weeks per year unless "otherwise furnished with the means of education."[151] It did not specifically penalize truancy—generally defined as an "accumulation of *unexcused* absences in excess of those allowed by state law"[152]—but chronic absenteeism under the statute

148. Since *Rodriguez*, discussions of the political dimensions of this issue have largely focused on state and local school finance reform, and more recently, vouchers and school "choice." *See, e.g.*, James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2058–91 (2002). On the racial motivation for school choice programs in the *Brown* period, *see* Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1 (1992).

149. *Building Abolition Futures*, *supra* note 17, at 550 ("While these educational outcomes [funneling targeted non-white and poor youth towards non-living wage work] are not new, the expansion of our prison nation in the U.S. over the last three decades has strengthened policy, practice and ideological linkages between schools and prisons.").

150. An Act Concerning the Attendance of Children at School, 1867 St.1852, c. 240, §§ 1, 2, 4 (1852) (current version at Mass. Acts 240, https://archives.lib.state.ma.us/actsResolves/1852/1852acts0240.pdf. Gen. Laws Ann. ch. 76, § 1 (2014)) (hereinafter An Act Concerning)

151. *Id.*

152. Jillian M. Conry & Meredith P. Richards, *The Severity of State Truancy Policies and Chronic Absenteeism*, 23:1–2 J. EDUC. FOR STUDENTS PLACED AT RISK 187, 188 (2018). Some states adjudicate juveniles as status offenders on the basis of habitual truancy as an extension of school punishment. For example, in West Virginia, a student may receive an out-of-school suspension, and then be found truant because of the resulting absences. *In re* Brandi B., 231 W. Va. 71, 743 S.E.2d 882 (2013). In this case, the juvenile was put on probation as a result of the status offense, and the probation conditions required her to stay in school through graduation (whereas the relevant state law otherwise permitted her to withdraw at age 17). *Id.* at 85. The Supreme Court of West Virginia upheld both the suspension and the probation conditions against a due process challenge.

carried a penalty of $20.[153] Since their inception, compulsory attendance laws have been justified by reference to the necessity of education.[154]

From 1918 to the present, all states have had compulsory attendance laws that generally require confinement of school-age children in school for part of the day for a certain number of days per year.[155] In *Meyer v. Nebraska*, the Court justified compulsory education laws as a corollary to the parent's "right of control" over a minor child.[156] By the 1950s, nearly all states mandated school attendance through secondary school.[157] Penalties for truancy or chronic absenteeism are wide-ranging, including fines and imprisonment,[158] denial of government benefits,[159] community service,[160] loss or

153. An Act Concerning, *supra* note 150.

154. *Commonwealth v. Roberts*, 159 Mass. 372, 374, 34 N.E. 402, 403 (1893) ("The great object of these provisions of the statutes has been that all the children shall be educated."); Jillian M. Conry & Meredith P. Richards, *The Severity of State Truancy Policies and Chronic Absenteeism*, 23:1–2 J. EDUC. FOR STUDENTS PLACED AT RISK 187, 190–91 (2018); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 827 n.208 (1985).

155. Augustina Reyes, *Compulsory School Attendance: The New American Crime*, 10 EDUC. SCI. 75, 80 (2020); Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1919 (1996).

156. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.").

157. Jillian M. Conry & Meredith P. Richards, *The Severity of State Truancy Policies and Chronic Absenteeism*, 23:1–2 J. EDUC. FOR STUDENTS PLACED AT RISK 187, 191 (2018).

158. *See, e.g.*, Code of Ala. § 16-28-12 (2006) (up to 90 days incarceration for parent who fails to send or compel child to attend); Alaska Stat. Sec. 11.51.130(a)(3) (1994) (up to one year incarceration for aiding, inducing, causing, or encouraging a child to be absent from school without cause); Cal. Penal Code § 270.1 (2010) (up to one year incarceration for failing to reasonably supervise and encourage the pupil's attendance even after being offered support services to address truancy); Colo. Rev. Stat. 22-33-108 (2016) (on contempt finding for failing to obey order to compel student's attendance, parent may be incarcerated "until the order is complied with"); 14 Del. C. § 2729 (2016) (up to 30 days incarceration for third or subsequent offense of failing to make reasonable efforts to ensure attendance of child);); Fla. Stat. § 1003.27 (2012) (up to 60 days incarceration for parent as matter of strict liability for failure of child to attend); Haw. Rev. Stat. § 302A-1135 (1996) (up to 30 days incarceration upon showing that parent had not used "proper diligence to enforce the child's regular attendance"); Idaho Code § 33-207 (2015) (up to 6 months in jail for as matter of strict liability for failure of child to attend); *see also id.* (child may be fined up to five dollars per day of absence); 105 I.L.C.S. (Ill.) 5/26-10 (1977) (up to 30 days imprisonment); Indiana Code 35-50-3-4 (1978) (up to 60 days incarceration as a strict liability matter for failing to ensure attendance); Iowa Code § 299.6 (2013) (up to 30 days incarceration for violating an agreement to ensure attendance after initial truancy); Kentucky Rev. Stat. § 159.990 (2013) (up to 90 days incarceration for failing to "send . . . to school" a child subject to compulsory attendance law); La. Rev. Stat. § 17:221 (2011) (up to 30 days incarceration for failing to "send . . . to . . . school" child subject to compulsory attendance law); 20-A Maine Rev. Stat. § 5053-A (2011) (fine of up to $250); Md. Education Code Ann. § 7-301 (2017) (up to five days for failing to take reasonable efforts to ensure child's attendance); Mass. Gen. Law ch. 76, §§ 2, 4 (2008) (fine of up to $200 for inducing absence of minor or $20 per day for failing to ensure attendance); Mich. Comp. Laws Ann. § 380.1599 (2015) (not less than two nor more than 90 days incarceration as a matter of strict liability for child's truancy); Minn. Stat. § 120A.34 (2002) (fine of up to $300); Miss. Code Ann. § 97-5-39 (2018) (up to one year of incarceration for knowingly or recklessly committing any act or omission that contributes to the delinquency of any child); Missouri Rev. Stat. § 15-289 (1976) (up to 15 days incarceration for failing to cause the child to regularly attend school); Mon. Code Ann. §§ 20-5-106 41-5-1512 (2019) (up

denial of driver's license,[161] and loss of custodial rights by taking the young person into the foster care system, among others.[162] Each year, in policing truancy, U.S. states: remove more than 1,000 truant students from their own homes and place them in foster homes or group homes, or incarcerate them in juvenile detention;[163] impose financial penalties on 150,000 parents or students; and place 15,000 students on probation.[164] Children are found to be educationally neglected by their parents even when the parents have

to 45 days for the child at a youth correctional facility); R.S. Neb. § 79-210 (2006) (up to 90 days incarceration); N.J. Rev. Stat. § 18A:38-31 (2013) (fine of up to $100 for guardian failing to ensure appearance of child); N.Y. Educ. Law § 3233 (2019) (up to 60 days imprisonment); N.C. Gen. Stat. § 115C-380 (2014) (up to 120 days incarceration as a matter of strict liability for failing to ensure appearance); N.D. Cent. Code § 15.1-20-03 (up to 30 days incarceration for parent for not making reasonable and substantial efforts to ensure student attendance); 70 Okl. St. § 10-109 (2014) (temporary detention for the duration of the school day by any law enforcement officer or administrator who finds student outside school during the school day); S.C. Code Ann. § 59-65-20 (2012) (up to 30 days incarceration for parent or guardian who "neglects to enroll" or "refuses to make [their] child . . . attend school"); Tex. Educ. Code Sec. 25.093 (up to $500 per offense as of a fifth offense, where each day of absence may constitute a separate offense); Utah Code Ann. 53G-6-208 (2019) (temporary detention for the duration of the school day by any law enforcement officer or administrator who finds student outside school during the school day); 16 Vermont S.A. § 1127 (2019) (fine of up to $1,000 for failing to cause child to attend school continually without valid excuse); Rev. Code Wash. (ARCW) 28A.225.090 (2015) (a student defying a court order related to return to school may be incarcerated for contempt or sentence to e-carceration); D.C. Code § 38-203 (2018) (up to five days incarceration for failure to ensure attendance of child) [hereinafter State Truancy Statutes].

159. *See, e.g.*, Mich. Comp. Laws. Ann. § 400.57b (West 2020). *See also* HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 438 (2019) (reporting that as of July 2017, 37 states linked eligibility for assistance funded by the Temporary Assistance for Needy Families authorization to some kind of attendance requirement).

160. *See, e.g.*, 14 Del. Code Ann. tit. 14, § 2730 (West 2018) (providing range of coercive interventions, including community service and possibly juvenile detention, for student for failing to attend if parent or guardian made reasonable efforts); Md. Education Code Ann. § 7-301 (West 2018) (community service for parent); 70 Okl. St. § 2-2-103 (2014) Okla. Stat. tit. 10, § 10-105 (West 2020) (community service for child).

161. *See, e.g.*, Ark. Code Ann. § 6-18-222(b)(2) (2013); (West 2019); Fla. Stat. Ann. § 1003.27 (2012); O.C.G.A. (Georgia) (West 2019); Ga. Code Ann. § 20-2-690.2 (West 2018); La. Rev. Stat. Ann. § 17:221 (2019)

162. *See, e.g.*, Fla. Stat. Ann. § 1003.27 (West 2019) (habitual truancy triggers "child-in-need-of-services" petition, which can result in termination of parental rights); O.C.G.A. (Georgia) § 20-2-690.2 (West 2018) (same); Idaho Code Ann. § 33.207 (West 2020) (same); Kan. Stat. Ann. § 72-3121 (West 2020) (same); N.M. Stat. Ann. § 22-12A-12 (2019) (same); Pa. Stat. and Cons. Stat. Ann. § 13-1333.3 (West 2018) (referral for possible disposition as a dependent child for a second truancy violation within three year period of a first violation); 1956 R.I. Gen. Laws. Ann. § 16-19-6 (West 2020) (providing for adjudication as "wayward child," establishing grounds for family court intervention).

163. Dana Goldstein, *Inexcusable Absences: Skipping School Is a Problem. But Why Is It a Crime?*, THE MARSHALL PROJECT (March 6, 2015), https://www.themarshallproject.org/2015/03/06/inexcusable-absences.

164. Augustina Reyes, *Compulsory School Attendance: The New American Crime*, 10 EDUC. SCI. 75, 95 (2020) [hereinafter *New American Crime*]. This study further found that despite virtually identical attendance rates between Black, Hispanic, American Indian, and white students, white students received disproportionately less punishment. *Id.* at 85–90.

requested, but been denied, services for their children;[165] they are committed to juvenile facilities for truancy even when the family is homeless and necessary interventions to help the household are not provided;[166] and they are found "guilty" of "unruly" conduct because of medical absences that are not sufficiently documented.[167]

Absence from schools that teach and nurture is a manifest concern.[168] But studies show that criminalizing absenteeism has "not increased attendance rates"—rather, it has "pushe[d] students away from school and force[d] poor and minority families deeper into poverty."[169] That the criminalization approach produces this perverse effect should not be surprising: Prime among the factors that contribute to a child's absence from school is poverty[170]—and the related problems of housing insecurity or lack of housing, lack of transportation, and food insecurity—all of which are exacerbated by engagement with the criminal punishment system.[171] Nor is prosecution a viable means of dealing with some common causes of absenteeism, such as medical conditions that schools are unable to or do not accommodate.[172] While many states have nominally moved away from criminalization and instead toward service-delivery models of responding to absenteeism, as recently as 2013, 50 percent of all juvenile status offense arrests were for

165. *See, e.g.*, *In re Mary M.*, 787 N.Y.S.2d 679 (Table), 2004 WL 895962 (N.Y. Fam. Ct. 2004) (child found to be educationally neglected by parents on evidence of inadequate reading skills and truancy, despite mother's request for educational services).

166. *See, e.g.*, *Chimacum Sch. Dist. v. R.L.P.*, 448 P.3d 94 (Wash. Ct. App. 2019) (reversing 2017 truancy petition that resulted in juvenile court order against child whose family was homeless).

167. *See, e.g.*, *In Interest of A.D.F.*, 335 S.E.2d 144 (Ga. Ct. App. 1985).

168. *See* Farah Z. Ahmad & Tiffany Miller, *The High Cost of Truancy*, CENTER FOR AMERICAN PROGRESS(Aug.2015),https://cdn.americanprogress.org/wpcontent/uploads/2015/07/29113012/Truancy-report4.pdf.

169. *New American Crime*, *supra* note 164, at 95. *See also* Dana Goldstein, *Inexcusable Absences*, THE NEW REPUBLIC (Mar. 6, 2015), https://newrepublic.com/article/121186/truancy-laws-unfairly-attack-poor-children-and-parents (stating that "[g]etting tough on truancy doesn't help students get an education—and it unfairly attacks the poor"); Deborah Fowler, Mary Schmid Mergler, Kelli Johnson, and Morgan Craven, *Class, Not Court: Reconsidering Texas' Criminalization of Truancy*, TEXAS APPLESEED(2015),
https://www.texasappleseed.org/sites/default/files/TruancyReport_All_FINAL_SinglePages.pdf
(discussing "disengagement and dropout" as harmful effects of criminalization on children).

170. *See* Marc Cutillo, *Poverty's Prominent Role in Absenteeism*, EDUCATION WEEK (Feb. 28, 2013), https://www.edweek.org/ew/articles/2013/02/27/22cutillo.h32.html (reporting results of studies that show higher absentee rates in high-poverty schools and that "[a]n overwhelming majority of chronically absent kids are impoverished").

171. ELLA BAKER CENTER FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015) (describing costs borne by families when a loved one faces criminalization).

172. Molly Redden, *The Human Costs of Kamala Harris' War On Truancy*, HUFFPOST (Mar. 3, 2019),https://www.huffpost.com/entry/kamala-harris-truancy-arrests-2020-progressive prosecutor_n_5c995789e4b0f7bfa1b57d2e (describing the arrest of Cheree Peoples, whose daughter "missed school because she was in too much pain to leave the house or was hospitalized for long-term care" while she "[fought] with the school to get it to agree to additional accommodations under an Individualized Education Plan").

truancy.[173] Moreover, most state laws that provide for incarceration permit incarceration only *after* an attempt has been made at delivering some form of service or other support.[174] This suggests that, in practice, the "service-delivery" models and openly carceral approaches may reinforce, rather than substitute for, one another.[175]

Indeed, for decades, the regulation of truancy and youth delinquency has been an area in which social services were subsumed within the criminal punishment system, creating a potent tool for racial and class stratification.[176] Under this model, police in poorer, mostly Black neighborhoods conducted "interrogations of suspected truants" to investigate crimes or even to "identify potential criminals."[177] Early on, experts recognized that the rush to detect "predelinquent" or "pre-criminal" youth had the effect of stigmatizing the targeted children, and not simply in a metaphoric sense. Rather, for children who are labeled in this way, the practice is known to generate "multiple handicaps: increased police surveillance, neighborhood isolation, lowered receptivity and tolerance by school officials, and rejection by prospective employers."[178] Despite these known concerns, policy-makers nevertheless pursued a zealous "war on crime," extending the reach of the carceral state into childhood and public schooling in ways that worsened conditions for Black, Brown, and poor youth.[179] As Elizabeth Hinton has documented, the consequence of merging social service provision with the criminal punishment system has been to criminalize innocent youthful behaviors and to withhold supportive services along racial and class lines.[180]

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173. *New American Crime*, *supra* note 164, at 95.

174. *See* State Truancy Statutes, *supra* note 158. Indeed, it is the threat of incarceration that is intended to induce acceptance of the offer of support.

175. The case of "Grace," which is discussed in some detail below, *see infra* notes 211–21 and accompanying text, illustrates the dynamic of the service-delivery model reinforcing, rather than substituting for, explicitly carceral regulation.

176. *See generally* Elizabeth Hinton, *Creating Crime: The Rise and Impact of National Juvenile Delinquency Programs in Black Urban Neighborhoods*, 41(5) J. URBAN HIST. 808 (2015) [hereinafter, *Creating Crime*].

177. *Id.* at 815.

178. U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, YOUTH DEVELOPMENT AND DELINQUENCY PREVENTION ADMINISTRATION, THE CHALLENGE OF YOUTH SERVICE BUREAUS 5 (1973).

179. *Creating Crime*, *supra* note 176, at 814 (discussing the "relentless expansion of the carceral state around [Black youth]").

180. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION 221 (2016) [hereinafter HINTON, WAR ON CRIME] (stating that the merger "effectively criminalize[] black children and teenagers and decriminalize[] white youth"); *see also id.* at 222 ("[T]he social welfare arm . . . treated white and middle-income youth, [while] the punitive arm handled young people from segregated urban neighborhoods.").

Nor is the enforcement of confinement in schools the end of the story. Parents and guardians who try to escape the boundaries of school-district confinement—for example, by enrolling a child in an out-of-district school where an extended family member might live—themselves face criminal punishment or civil sanction. And, while at school, students are subject to similar criminalizing forces that perpetuate racial and class stratification.

C. CARCERAL SCHOOLS AS EXTENSIONS OF THE CARCERAL STATE

In recent decades, the public school has become ever more carceral in appearance and function. As described by Loïc Wacquant, public school-children in (what he calls) the "hyperghetto" are:

> [l]ike inmates, . . . herded into decaying and overcrowded facilities built like bunkers, where undertrained and underpaid teachers, hampered by a shocking penury of equipment and supplies—many schools have no photocopying machines, library, science laboratory, or even functioning bathrooms, and use textbooks that are thirty-year-old rejects from suburban schools—strive to regulate conduct so as to maintain order and minimize violent incidents. . . . [M]ost . . . resemble[] fortresses, complete with concertina wire on outside fences, bricked up windows, heavy locks on iron doors, metal detectors at the gates and hallways patroled by armed guards who conduct spot checks and body searches . . . . [E]ssential educational programs have been cut to divert funds for more weapons scanners, cameras, emergency telephones, sign-in desks, and security personnel . . . . Indeed, it appears that the main purpose of these school is simply to 'neutralize' youth considered unworthy and unruly by holding them under lock for the day . . . . [T]he carceral atmosphere of schools . . . habituates the children of the hyperghetto to the demeanor, tactics, and interactive style of the correctional officers many of them are bound to encounter[.]

Statistics bear out this description of "supermax schools."[181] In New York City, for example, the number of school-based police officers would, if constituted as a standalone department, be the fifth-largest police department in the nation with a higher per capita concentration of officers than Chicago, Los Angeles, Philadelphia, or Dallas.[182]

181. ANNETTE FUENTES, LOCKDOWN HIGH: WHEN THE SCHOOLHOUSE BECOMES A JAILHOUSE 81 (2013).

182. GIRLS FOR GENDER EQUITY, NEW YORK CITY CAN'T WAIT: SHRINK POLICING IN THE NAME OF PUBLIC HEALTH 2 (2020); *see also* CHILDREN'S DEFENSE FUND OF NEW YORK, "UNTHINKABLE:" A HISTORY OF POLICING IN NEW YORK CITY PUBLIC SCHOOLS & THE PATH TOWARD POLICE-FREE SCHOOLS 19 (2019) (finding the known cost of the NYPD social safety division is $431 million annually, but that the real cost is higher) [hereinafter UNTHINKABLE]. For more background, *see* NEW YORK CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (2007).

Moreover, the police who are stationed in, or called into, public schools, function as a major force for subordinating Black, Brown, and poor students.[183] Approximately 70 percent of the nation's nearly 50,000 school-based police officers engage in school discipline enforcement, as well as or instead of law enforcement.[184] According to New York City data, Black students were 14 times more likely, and Latinx students five times more likely, than white students to be arrested for school-based incidents.[185] Indeed, as the number of school-based police has increased (and their mandate expanded) over the past fifty years, it was all but inevitable that more minor disciplinary matters previously handled within the school would result in arrests.[186]

The numbers bear out this common-sense intuition. In 2015–2016, the last year for which national data are available, 290,600 public school students were referred to law enforcement agencies or arrested.[187] Not only were Black students disproportionately arrested, but the disproportion was worse than in previous years.[188] Disturbingly, between 2013 and 2018, over 30,000 children under 10-years-old were arrested—many at school[189]—and in 2018 alone, 100,000 young people were brought before juvenile court judges for status offenses.[190] Accounts of numerous youth arrests have gone "viral," including an incident in which the police handcuffed an eight-year-old student, who stood three-and-a-half-feet tall and whose wrists were too

183. For an overview of the critical race theory literature on the subject, *see* David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506 (2014).

184. ALEX VITALE, THE END OF POLICING 49 (2017) [hereinafter END OF POLICING].

185. NEW YORK CITY SCHOOL-JUSTICE PARTNERSHIP TASK FORCE, KEEPING KIDS IN SCHOOL AND OUT OF COURT: REPORT AND RECOMMENDATIONS (2013). Nor are these results outliers. Travis Riddle and Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 17 (2019); Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617 (2015); Josh Kinsler, *Understanding the Black-White School Discipline Gap*, 30 ECON. EDU. REV. 1370 (2011).

186. Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73 (2006); *see also* END OF POLICING, *supra* note 188, at 49–50.

187. U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, 2015–16 CIVIL RIGHTS DATA COLLECTION:SCHOOLCLIMATEANDSAFETY3(2016), https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.

188. *Id.* Notably, between 2013 and 2016, the number of school arrests dropped, but the proportion of Black students among arrests rose. *Id.*

189. Bill Hutchison, *More than 30,000 children under age 10 have been arrested in the US since 2013: FBI*, ABC NEWS (Oct. 1, 2019), https://abcnews.go.com/US/30000-children-age-10-arrested-us-2013-fbi/story?id=65798787.

190. Dawn R. Wolfe, *Thousands of Children on Probation Are Incarcerated Each Year for Nonviolent, Noncriminal Behaviors*, THE APPEAL (Sept. 4, 2020), https://theappeal.org/thousands-of-children-on-parole-are-incarcerated-each-year-for-nonviolent-noncriminal-behaviors/.

small to be constrained by the handcuffs.[191] Sometimes the arrest is outsourced: it is tragically common for school officials to report Central American students to Immigration and Customs Enforcement, on the purported ground of gang activity.[192] In addition to direct subordination of those arrested, the evidence suggests exacerbated racial disparities in educational attainment school-wide: based on differences in timing in the rollout of a school-based police surge program in New York City, researchers determined that "the negative impact of aggressive policing on Black male students' [test scores] is large enough to cancel out the potential benefits of other (often costly) interventions" (such as improving teacher quality).[193] The life-long harms caused by arrests (or, to varying degrees, other forms of discipline) at school are extremely well-documented[194] and create further barriers to obtaining government benefits, housing, and employment.[195] Yet

191. Eric Levenson & Tina Burnside, *Key West Police Arrested an 8-Year-Old at School. His Wrists Were Too Small for the Handcuffs*, CNN (Aug. 11,2020), https://www.cnn.com/2020/08/11/us/8-year-old-boy-key-west-arrest-trnd/index.html.

192. Hannah Dreier, *He Drew His School Mascot—and ICE Labeled Him a Gang Member: How High Schools Have Embraced the Trump Administration's Crackdown on MS-13, and Destroyed Immigrant Students' American Dreams*, PROPUBLICA (Dec. 27, 2018), https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/ (describing school resource officer reporting a student's doodle, resulting eventually in his deportation); *see also* Randy Capps, Jodi Berger Cardoso, Kalina Brabeck, Michael Fix, and Ariel G. Ruiz Soto, *Immigration Enforcement and the Mental Health of Latino High School Students*, Migration Policy Institute (Sept. 2020) (finding a majority of Latinx high school students have diagnosable mental health conditions caused by deportation-related fear, anxiety, and depression); Alice Speri, *From School Suspension to Immigration Detention: For Immigrant Students on Long Island, Trump's War on Gangs Means the Wrong T-Shirt Could Get You Deported*, THE INTERCEPT (Feb. 11, 2018), https://theintercept.com/2018/02/11/ice-schools-immigrant-students-ms-13-long-island/; Combating Gang Violence on Long Island: Shutting Down the MS Pipeline, Field Hearing Before the Sub-Committee on Counterterrorism and Intelligence of the Committee on Homeland Security of the House of Representatives, 150th Sess., Serial No. 115-20 (2017) (describing schools as priority sites for gang policing, including for reporting of students suspected of being gang members to ICE).

193. Joscha Legewie, Chelsea Farley, and Kayla Stewart, *Aggressive Policing and Academic Outcomes: Examining the Impact of Police "Surges" in NYC Students' Home Neighborhoods*, RESEARCH ALLIANCE FOR NEW YORK CITY SCHOOLS: POLICY BRIEF 4 (2019); *see also* END OF POLICING, *supra* note 188, at 49 (describing that, when No Child Left Behind sparked an increase in school disciplinary incidents in North Carolina, racial disparities in suspension worsened); Subini Annamma, Deb Morrison, and Darrell Jackson, *Disproportionality Fills in the Gaps: Connections Between Achievement, Discipline, and Special Education in the School-to-Prison Pipeline*, 5(1) BERKELEY REV. EDU. 53 (2014).

194. *See* Jason A. Okonofua, Gregory M. Walton, and Jennifer L. Eberhardt, *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*, 11 PERSPS. PSYCHOL. SCI. 381 (2016); Devah Pager, Bruce Western, and Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANN. AM. ACAD. POL. SOC. SCI. 195 (2009); Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. EDU. 368 (2009); *see also Deadly Symbiosis*, *supra* note 184, at 115 ("46 percent of the inmates in New York state prisons issue from neighborhoods served by the 16 worst public schools of the city.").

195. *See* HERSHKOFF & LOFFREDO, *supra* note 159, at 12 (discussing effect of criminal records on eligibility for benefits funded through the Temporary Assistance for Families Program); 106–07 (dis-

even without incidents such as arrests or discipline, the mere presence of police within a school can have a negative impact on students' educational outcomes.[196]

Educational carceralism is not limited to having police arrest children while they are at school. Teachers and administrators also play an important role in policing of students, and to a similar negative effect. Subini Annamma has theorized a "pedagogy of pathologization," which responds to students' vulnerability with "hyper-surveillance" and, ultimately, with the "criminalizing of difference."[197] Many school discipline codes have incorporated elements of criminal law, effectively requiring teachers to do law enforcement work.[198] In an increasing array of circumstances, teachers are required to report misbehavior to police.[199] Moreover, schools have adopted prison discipline methods. In Illinois, for example, school officials placed students in solitary confinement ("quiet rooms") 20,000 times over 15 months—often, prone and shackled ("restrained") to the floor.[200] Pedagogically and technologically informed by the encroaching carceral logic, teachers are, in some schools, charged with suppressing student will as much (or more than) with helping students develop capabilities necessary to live meaningfully self-determined lives.[201] As Erica Meiners explains:

> Those disenfranchised, for example, the youth who see this connect[ion] between schools and jails and the correspondingly narrow discussions of what counts as an educational issue, have a right to be hostile. Anger, an 'outlaw emotion,' is a legitimate response to injustice or violence. But what happens when individuals who are racially profiled and tracked toward special education, undereducated in low-resource schools that possess metal detectors and have drug searches by the on-site school police

cussing effect of criminal records on employment); 650–51 (discussing effect of criminal records and public housing).

196. Paige Fry, *More Than 400 People Join March to Call for Removal of Police in Chicago Schools*, Chicago Tribune (Aug. 22, 2020), https://www.chicagotribune.com/news/breaking/ct-saturday-protests-chicago-police-cps-whitney-young-20200823-dytuu33cmjdi5alx4th53hagye-story.html (quoting a student who said, "I got into this school, thinking, hey maybe I'll have a chance . . . . What's it worth when I'm too scared to ask an SRO (school resource officer) to move out of a space in the library so that I can complete an assignment because my hands are shaking?").

197. SUBINI ANNAMMA, PEDAGOGY OF PATHOLOGIZATION: DIS/ABLED GIRLS OF COLOR IN THE SCHOOL-PRISON NEXUS 49 (2018). *See also* ERICA MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 47 (2007) ("The role of teaching (and social work) was to execute class-based surveillance and monitoring.") [hereinafter RIGHT TO BE HOSTILE].

198. RIGHT TO BE HOSTILE, *supra* note 201, at 3, 35.

199. *Id.*

200. Jennifer Smith Richards, Jodi S. Cohen, Lakeidra Chavis, and Dan Petrella, *There's an Emergency Ban on Isolated Timeouts in Illinois Schools. What's Next?*, PROPUBLICA ILLINOIS (Nov. 19, 2020),https://www.propublica.org/article/illinois-students-school-seclusion-rooms-state-board-education-meeting-isbe.

201. RIGHT TO BE HOSTILE, *supra* note 201, at 46. ("[T]he white lady teacher is charged, implicitly, with colonizing her 'native' students and molding them into good citizens of the republic.").

> stations, one guidance counselor for 500 students, and a low track record of graduation or for placing students in a community college or university, *get angry*? . . . What mechanisms, built into the expanding [prison-industrial complex], transform these legitimate responses of anger and critique into a dysfunction or a pathology? The response and the analysis of someone who clearly has the moral right but not a legal right to be hostile, gets translated from a critique into a youth with an anger management problem. . . . [Y]outh who are caught up in the intersections between schools and jails are [] constructed as dangerous, uneducable public enemies, requiring containment[.][202]

In addition to these legal, institutional, and ideological drivers, one cannot underestimate the effects of austerity, and the state's inability or refusal to fund social services for households that subsist on minimum wage jobs, temporary jobs, or no jobs at all (while linking such services to carceral methods of surveillance).[203] Instead, public moneys are directed toward punitive programs and personnel. Kelley Fong, relying on interviews with school and child welfare officials, has found that "concerned professionals with limited options end up turning to an agency with coercive authority" to address classroom problems, because that agency (often Child Protective Services) "is what remains."[204] In so doing, educators often "channel families to state surveillance that threatens child removal" and may end up "criminalizing marginalized youth in the process."[205] Ultimately, however, families often are left "experienc[ing] surveillance without material support," with the end of "exacerbat[ing] social stratification" because the surveillance leads to some form of criminalization."[206]

The story of "Grace," a 15-year-old Black girl who attends high school in a suburb to the north of Detroit, Michigan, underscores these dynamics. Grace, whose pandemic-era transition to online classes was made more difficult because of "a history of mental health issues and living with disa-

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202. *Id.* at 6–7 (emphasis in original); *see also id.* at 28–29 ("[I]f one does not have the right to be hostile, where does the anger go when it is 'a grief of distortions between peers, and its object is change.'"), *quoting* AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 129 (1984).

203. *See* Dorothy E. Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480.

204. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85(4) AM. SOC. REV. 610, 629 (2020) [hereinafter *Eyes in the Home*].

205. *Id.* at 627, 630. Dorothy Roberts has similarly argued:

> All institutions in the United States increasingly address social inequality by punishing the communities that are most marginalized by it. Systems that ostensibly exist to serve people's needs—health care, education, and public housing, as well as public assistance and child welfare—have become behavior modification programs that . . . resort to a variety of punitive measures to enforce compliance.

Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700 (2019).

206. *Eyes in the Home*, *supra* note 208, at 629, 630.

bilities,"[207] slept through an online class one morning in May 2020.[208] The month before, an Oakland County Circuit Court Judge had sentenced Grace to probation, the terms of which included not missing any coursework.[209] The caseworker assigned to monitor Grace—one of several forms of surveillance imposed as part of her probation—informed the court that Grace had missed class.[210] On May 14, 2020, the judge sentenced Grace to juvenile detention for violating probation.[211]

To the extent that Grace's behavior indicated a problem, it could have been understood—or at least investigated as—one of inadequate service provision, rather than one of misbehavior. Grace, who has an Individualized Education Plan (IEP) because of her Attention Deficit Hyperactivity Disorder and mood disorder, had not been receiving the support specified in her IEP since the start of the pandemic.[212] In light of the circumstances and the onerous terms of the probation, Grace and her mother already had told told the caseworker that Grace felt "anxious" and "overwhelmed."[213] However, prior to reporting Grace to the court, the caseworker had no information about Grace's school performance; apparently only later did the caseworker speak to the teacher and learn that Grace was performing comparably to her classmates.[214] By then, the judicial machinery had been set in motion, with the caseworker serving as one more instrument of criminalization against a backdrop of deprivation.[215] Statistics suggest that Grace's story is the norm

207. Letter from Ayanna Pressley, Debbie Dingell, Brenda Lawrence, Andy Levin, Haley Stevens, and Rashida Tlaib, to Attorney General Barr and [Education] Secretary DeVos, dated July 29, 2020, https://pressley.house.gov/sites/pressley.house.gov/files/2020%2007%2029%20Grace%20Michigan%20Letter%20ED%20DOJ%20v7%20vF.pdf [hereinafter Pressley Letter].

208. Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention.*, PROPUBLICA (July 14, 2020), https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention [hereinafter *A Teenager Didn't Do Her Online Schoolwork*].

209. *Id.* The case that resulted in the imposition of probation arose from minor incidents a year prior.

210. *Id.*

211. *Id*.

212. Under regulations implementing the Individuals with Disabilities Education Act (IDEA), Grace's school is required to provide this support. 34 C.F.R. § 300.110, §§ 300.121–300.156 (2013); *see also* 20 U.S.C. §§ 1401 *et seq*. *See generally* HERSHKOFF & LOFFREDO, supra note 159, at 450–52 (setting out requirements). *See* Pressley Letter, *supra* note 211 ("[R]eports indicate that none of her accommodations, which are guaranteed by federal law, were in place.").

213. *A Teenager Didn't Do Her Online Schoolwork*, *supra* note 212.

214. *Id*.

215. *Id.* On August 11, 2020, the Michigan judge terminated Grace's probation, finding she had made adequate progress. *See* Jodi S. Cohen, *Case Closed: Michigan Judge Removes Grace, Black Teen Jailed for Not Doing Online Schoolwork, From Probation*, PROPUBLICA ILLINOIS (Aug. 11, 2020), https://www.propublica.org/article/case-closed-michigan-judge-removes-grace-black-teen-jailed-for-not-doing-online-schoolwork-from-probation#987309.

for Black girls—especially Black girls with disabilities.[216] Indeed, the dynamics illustrated by Grace's odyssey seemed poised to worsen during the pandemic as many schools opted for "virtual" classrooms, thereby expanding opportunities to surveil and punish children and families in unprecedented ways.[217]

In sum, students from less wealthy, less white communities not only are locked into failing schools and their families locked out of politics to change conditions in those schools, but also they are criminalized (along with their families) by laws that compel their attendance. Once in the classroom, policing and subjugation continue. If education is understood as a process that helps students develop their capacities to live meaningfully self-determined lives,[218] then the public schooling offered to Black, Brown, and poor children—preparation for a life of menial labor and criminal punishment—fails utterly.[219] The focus on surveillance and punishment within schools bears an echo of the concept of teaching emancipated Black people during Reconstruction that they were "free only to labor."[220] Carceral schools depend on a system of discipline that is aimed not at fostering the skills and capabilities that justify the compulsory nature of education, but

216. SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS: FACT SHEET 4 (2019), https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf; Daniel Losen, Cheri Hodson, Jongyeon Ee, and Tia Martinez, *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, 5(2) J. APPLIED. RES. ON CHILDREN: INFORMING POLICY FOR CHILDREN AT RISK 15, 1–2 (2014).

217. Bianca Vázquez Toness, *Your Child's a No-Show at Virtual School? You May Get a Call from theState'sFosterCareAgency*,BOSTONGLOBE(Aug.15,2020), https://www.bostonglobe.com/2020/08/15/metro/your-childs-no-show-virtual-school-you-may-get-call-states-foster-care-agency/ (describing calls to child welfare agency after missing class); *Police Called on Student for Missing Zoom Call: Teacher Claims It's Child Abuse*, INFORMED AMERICAN (Aug. 20, 2020),https://www.informedamerican.com/police-called-on-student-for-missing-zoom-call-teacher-claims-its-child-abuse/ (report made based on behavior of sibling of student, where sibling's conduct was visible to teacher in background during class); Mary Retta, *Schools are Enforcing Dress Codes During Online Classes*, TEEN VOGUE (Aug. 20, 2020), https://www.teenvogue.com/story/schools-zoom-dress-code (describing deans threatening suspension based on observation of student dress while at home); Mia Jankowicz, *Colorado School Officials Called the Sheriff and Suspended a 12-year-old Black Boy After He Showed a Toy Gun in His Zoom Class*, INSIDER (Sept. 8, 2020), https://www.insider.com/colorado-school-called-sheriff-black-boy-toy-gun-zoom-class-2020-9.

218. *See generally* JEROME S. BRUNER, THE PROCESS OF EDUCATION (1960).

219. *Deadly Symbiosis*, *supra* note 184, at 108; *see also Creating Crime*, *supra* note 176, at 816 ("[U]rban schools increasingly resemble the penal facilities where an increasing number of young black men would eventually find themselves.").

220. *See supra* note 119 and accompanying text. JERALD PODAIR, THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS 21–25 (2003).

rather for "reproducing social relationships" of hierarchy;[221] at best, they provide the literacy skills needed for low-wage work.[222]

III. A LIBERTY-BASED APPROACH TO QUALITY PUBLIC SCHOOLING

Unfortunately, our account of America's public schools covers familiar territory. The system's basic failings, and their severe racial and class effects on hundreds of thousands of Brown, Black, and poor children, are well documented in court papers,[223] foundation reports,[224] scholarly articles,[225] and the popular press.[226] #BlackLivesMatter and the horrific videos

221. PAUL WILLIS, LEARNING TO LABOUR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 69, 66 (1977).

222. *Id.* at 212 (discussing the preference of employers for "more disciplined and frightened" students rather than "bright-eyed, enthusiastic" students who are "trying to expand the full range of [their] human talent"); *see also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 77, 161 (2007) (explaining that where "[c]hanges in public policy with respect to the working poor contributed to the abandonment of entire segments of labor," students who have "learned to labor" may be "educated for nothing at all" because of limited or nonexistent employment prospects). Indeed, the experience of criminalization, and particularly the burden of criminalization on Black people, has striking labor-market effects. Recent empirical evidence suggests that the decline in the share of union membership accounted for by Black workers in recent decades is likely due in part to criminalization, because past criminalization increases employer power over workers, reduces their likelihood of quitting notwithstanding job dissatisfaction, reduces odds of joining unions, and reduces odds of winning NLRB elections for unions with criminalized members. *See* Adam Reisch and Seth J. Prins, *The Disciplining Effect of Mass Incarceration on Labor Organization*, 125(5) AM. J. SOC. 1303 (March 2020).

223. *See, e.g.*, *infra* notes 259–264 and accompanying text; Class Action Complaint, *Cook et al. v. Raimondo*, 1:18-cv-00645, ECF No. 1 (D.R.I. Nov. 28, 2018); Press Release, *Landmark Lawsuit on Behalf of Public School Students Demands Basic Education Rights Promised in State Constitution*, ACLU (May 17, 2000), https://www.aclu.org/press-releases/landmark-lawsuit-behalf-public-school-students-demands-basic-education-rights (summarizing conditions cited in complaint in landmark case of *Williams v. California*).

224. *See, e.g.*, MINER P. MARCHBANKS III AND JAMILIA J. BLAKE, ASSESSING THE ROLE OF SCHOOL DISCIPLINE IN DISPROPORTIONATE MINORITY CONTACT WITH THE JUVENILE JUSTICE SYSTEM: FINAL TECHNICAL REPORT (2018); Monique W. Morrie, *Race, Gender, and the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls*, AFRICAN AMERICAN POLICY FORUM (2012); DANIEL J. LOSEN AND RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS (2010).

225. *See, e.g.*, MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2018); Sarah Aldridge, *Criminalization and Discrimination in Schools: The Effects of Zero Tolerance Policies on the School-to-Prison Pipeline for Black Girls*, 9 AISTHESIS 1 (2018); AUGUSTINA REYES, DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER? (2006).

226. Erica L. Green, *How Black Girls Get Pushed Out of School*, N.Y. TIMES (Apr. 4, 2020), https://www.nytimes.com/2020/04/04/us/politics/black-girls-school-racism.html; Editorial Board, *Why Is Va. Treating Its Students—Especially Its Black Students—Like Criminals?*, Wash. Post (Oct. 22, 2017), https://www.washingtonpost.com/opinions/from-the-classroom-to-the-courts-in-va-too-many-students-get-treated-like-criminals/2017/10/22/119cda9a-b5d9-11e7-9e58-e6288544af98_story.html; Editorial Board, *Criminalizing Children at School*, N.Y. Times (Apr. 18, 2013), https://www.nytimes.com/2013/04/19/opinion/criminalizing-children-at-school.html?searchResultPosition=9; *School-To-Prison Pipeline: A Curated Collection of Links*, THE MARSHALL PROJECT (2020), https://www.themarshallproject.org/records/67-school-to-prison-pipeline.

of police officers suffocating Black people to death have galvanized attention on the racism endemic in the criminal enforcement system and energized calls for the redeployment of funds for policing, jails, and prisons to more humane ends. Certainly, those funds could be used to #FreeGrace—to reimagine public schools as sites that allow children to grow and flourish. But surely the judicial system needs to see no additional videos of police arresting children for tantrums, outbursts, not doing homework, or absence to recognize the unacceptable and unequal treatment of Black, Brown, and poor children in many public schools.

This Part picks up where the Sixth Circuit in *Gary B.*[227] left off: justifying a federal constitutional right to public schooling in the liberty provision of the Due Process Clause—but understood within the frame of abolition constitutionalism. We celebrate the decision in *Gary B.* and the resulting settlement that will expand educational opportunities. We recognize that current students do not have the luxury of waiting for constitutional aspirations to be put in place. However, in our view, a federal right to education, to be even minimally adequate, must go beyond providing children with opportunities to acquire only the skills of basic literacy that are presumed to be necessary for their democratic participation.[228] Rather, the right we imagine and defend—a right to quality public schooling—seeks to redress denial of the children's equal liberty by countering the role that their education plays in perpetuating a lifetime of subordinated and marginalized status.

Our view finds support in constitutional precedent. In the 1954 decision in *Bolling v. Sharpe*, the Court held that a Black child's liberty interest is violated when compelled by law and under threat of punishment to attend segregated public schools.[229] Today segregation is *de facto*, but the force that the state uses to require Black, Brown, and poor children to attend sub-

227. *See supra* note 95.

228. *See infra* notes 336–47 and accompanying text.

229. *See* David E. Bernstein, Bolling*, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L. J. 1253, 1255 (2005) (stating "[t]he only novelty in *Bolling* is the idea that forcing blacks to attend segregated schools infringed on a liberty right protected by the Fifth Amendment's Due Process Clause"). For a recent and creative interpretation of the relationship between the due process and equality clauses, *see* Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 WM. & MARY BILL RTS. J. 383, 392 (2019):

> Perhaps the intertwining of equal protection and due process rests in judicial humility. . . . The justification for fusion of equal protection and due process on this view is *Epistemic* in nature. Due process claims assert that a fundamental right has been infringed, and in order to adjudicate these claims, we need to know what rights are truly fundamental. Perhaps equality-based notions can help. Similarly, claims that assert a violation of equal protection require courts to determine if the law distinguishes among people on the basis of a suspect trait. But what traits should be treated as suspect? Perhaps paying attention to who can and cannot exercise fundamental liberties will be informative.

standard public schools remains *de jure* causing a violation of their equal liberty to persist. Our liberty-based argument, inspired by the theory and practice of abolition constitutionalism, thus aims to dismantle the public school as an agent of a carceral state—schools that detain Black, Brown, and poor children without pedagogic purpose and instead perpetuate lifetime disadvantage. In their place, we reimagine public schools as democratic institutions where children can flourish and enjoy lives of equal liberty as guaranteed by the federal Constitution.

A. LIBERTY AS PROTECTION AGAINST UNJUSTIFIED RESTRAINT

The U.S. Constitution protects against deprivations of "life, liberty, or property, without due process of law" at the hands of either the federal or any state government.[230] The protections of the Due Process Clause apply to deprivations of liberty in the civil context as well as pursuant to criminal laws.[231] As the Supreme Court has repeatedly affirmed, "[l]iberty from bodily restraint" is the "core of the liberty protected by the Due Process Clause from arbitrary governmental action."[232] This liberty interest encompasses, but is not limited to, "freedom of movement."[233] In the context of civil confinement, the Court has held that this interest requires the State to provide "safe conditions."[234] The Court, moreover, has explicitly recognized that students attending public school benefit from the "historic liberty interest" in being "free from . . . unjustified intrusions on personal security," which encompasses "freedom from bodily restraint and punishment.[235]

In *Meyer v. Nebraska*, the Court acknowledged that a person has a liberty interest "to acquire useful knowledge."[236] This liberty interest directly affects the nature and scope of the state's power to mandate public schooling. As the Court explained, because "[t]he hours which a child is able to devote

230. U.S. Const., amends. V & XIV § 1.

231. *Specht v. Patterson*, 386 U.S. 605, 608 (1967) ("[C]ommitment proceedings whether denominated civil or criminal are subject . . . to the Due Process Clause.").

232. *See, e.g.*, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1972) (Powell, J., concurring in part and dissenting in part).

233. *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (recognizing liberty interest in "freedom of movement" and holding that it "survive[s] involuntary [civil] commitment").

234. *Id.* (holding that it is "unconstitutional to confine the involuntarily committed . . . in unsafe conditions"); *see also Hutto v. Finney*, 437 U.S. 678 (1978) (recognizing this right in the context of penal confinement).

235. *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977); *see also Goss v. Lopez*, 419 U.S. 565, 575 (1975) (recognizing that students have a liberty interest triggering due process protection when suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment").

236. 262 U.S. 390, 399 (1923) (stating that "[w]ithout doubt" liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge").

to study . . . are limited,"[237] laws imposing compulsory education inevitably cut off options outside of school for the child to acquire comparable skills and knowledge. Compulsory education laws thus are conditioned on the state's providing the student with meaningful opportunities to learn while at school. In later cases, the Court has stated that an individual's liberty interests are "not absolute."[238] In determining whether a state-imposed restriction violates an individual's liberty interests, courts "balance the liberty of the individual and the demands of an organized society."[239] Under this balancing approach, restrictions on liberty generally will be upheld only if they are "reasonably related to legitimate government objectives,"[240] a standard the Court first articulated in *Jackson v. Indiana*.[241] But the *Meyer* principle remains: Although a state may, consistent with due process, compel a young person to attend school, mandating attendance on threat of criminal or civil penalties triggers an obligation on the state's part to provide the student with a meaningful opportunity to learn. And, insofar as the liberty deprivation is justified by the governmental objective of providing education, the failure to provide students an adequate education ought to render the requirement of compulsory attendance unconstitutional.

B. LIBERTY AS A SOURCE OF THE STATE'S AFFIRMATIVE DUTY TO PROVIDE EDUCATION

The federal Constitution generally is regarded as a charter of negative rights against the government, and not of positive duties by the government to its citizens.[242] Thus, identifying liberty interests as the source of an affirmative duty of the state to provide education at a certain level or quality is analytically different from the more conventional situation of a judicial order removing a liberty-restricting ban or disability that impedes a person's liberty, as the Court did in *Obergefell* when recognizing a liberty-

237. *Id.* at 398 ("The hours which a child is able to devote to study in the confinement of school are limited.").

238. *Youngberg*, 457 U.S. at 320.

239. *Id.* (internal quotations omitted); *see also Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (noting that the nation has struck a balance between "liberty of the individual" and "the demands of organized society").

240. *Id.*; *see also id.* at 322 (rejecting the "'compelling' or 'substantial' necessity tests the Court of Appeals would require a State to meet to justify use of restraints or conditions of less than absolute safety").

241. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that, when a criminal defendant was involuntarily and indefinitely committed to a state mental institution before trial because of incapacity, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

242. Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 446–47 (1992) ("It is liberty or freedom from, not liberty or freedom to, which the Bill of Rights protects.").

based right to marriage equality.[243] But our proposition is doctrinally well established: the state's right to restrain a person's liberty is limited by the purpose of the restraint; some kinds of detention are constitutionally valid only if the state provides the goods or services that justify the restraint. Public schooling, supported by rules of compulsory attendance and state-enforced discipline, comfortably falls within this category.

In *Youngberg v. Romeo*, a case concerning the conditions of civil commitment, the Court held that the liberty provision of the Due Process Clause required the state to provide "such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints."[244] Drawing on its earlier decision in *Jackson v. Indiana*, the Court found that due process required the state to provide "minimally adequate training" to involuntarily committed persons with developmental disabilities.[245] The Court concluded that, to "prevent unreasonable losses of additional liberty as a result of [the involuntary] confinement,"[246] the facility had certain affirmative duties:

> [T]he State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.[247]

Although every Justice joined the opinion of the Court, a sharp division surfaced in two concurring opinions over the affirmative duty-to-provide-treatment question. Plaintiff argued that his right to "minimally adequate" habilitation embraced the right to such "treatment as [would] afford [him] a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit."[248] Plaintiff found support for this asserted federal constitutional right in Pennsylvania's statutory right to "care and treatment."[249] In Chief Justice Burger's view, this affirmative

243. *Obergefell*, 576 U.S. at 665–67.

244. *Youngberg*, 457 U.S. at 321. In *Youngberg*, the Third Circuit, sitting *en banc*, had endorsed a liberty-based right to treatment—a holding not repudiated by the opinion of the Court and endorsed by three Justices in a concurrence. *Romeo v. Youngberg*, 644 F.2d 147, 168 (3d Cir. 1980), *vacated on other grounds*, 457 U.S. 307 (1982) ("By basing Romeo's deprivation of liberty at least partially upon a promise of treatment, the state ineluctably has committed the community's resources to providing minimal treatment."). *See also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that involuntary confinement of a mentally ill person is unconstitutional if they can live in freedom without causing harm).

245. *Id.* at 327.

246. *Id.*

247. *Id.* at 323.

248. *Id.* at 330 and n.* (Burger, C.J., concurring). The opinion of the Court did not address this argument.

249. *Id.*

duty theory was "frivolous" because it amounted to an argument that "every substantive right created by state law [is] enforceable under the Due Process Clause," which would result in "the distinction between state and federal law quickly be[ing] obliterated."[250] Justice Blackmun, writing for three Justices, disagreed.[251] Citing *Jackson v. Indiana*'s "reasonable relation" requirement, Justice Blackmun's concurrence opined that it would raise a "serious issue" if the state confined someone for "care *and* treatment"—and then failed to provide the person with treatment.[252] When the state justified commitment "upon a promise of treatment," "due process might well bind the State" to provide at least some treatment to satisfy due process.[253] The Court has not since revisited the question over which the concurrences diverged.

The Sixth Circuit's decision in *Gary B.* went far in recognizing the viability of a liberty-based claim to public schooling. The case was an equal protection and due process challenge brought by plaintiffs at Detroit's five "lowest performing" schools.[254] Plaintiffs alleged shockingly bad conditions with respect to teaching,[255] facilities,[256] and materials.[257] Echoing *Youngberg* and *Jackson*, plaintiffs made (what they described as) a "negative rights" argument under the Due Process Clause: namely, that because the compulsory attendance law "restricted" plaintiffs' "freedom of movement and freedom from state custody," defendants' subsequent failure to "provide . . . an adequate education . . . render[ed] the detention arbitrary," thereby violating plaintiffs' due process rights.[258] Also under the heading of due process, plaintiffs argued they enjoyed a "fundamental right to a basic education, meaning one that provides access to literacy."[259] As to equal

250. *Id.*

251. Justice Blackmun's concurrence, joined by Justices O'Connor and Brennan, agreed with the Court's decision not to address the "failure to provide treatment" theory because of "uncertainty in the record" regarding whether plaintiff was denied treatment and whether the entitlement to treatment was properly raised below. *Id.* at 326 (Blackmun, J., concurring).

252. *Id.* at 325 (emphasis in original).

253. *Id.* at 326.

254. *Gary B. v. Whitmer*, 957 F.3d 616, 624 (6th Cir. 2020).

255. *Id.* at 624–25 (listing, *inter alia*, 200 vacancies in teaching staff, rampant short-term absences leading to widespread instruction by uncertified and unlicensed teachers, lack of appropriate curricular materials or support).

256. *Id.* at 625–26 (describing "decrepit or even unsafe physical conditions," including, *inter alia*, uniform lack of compliance with health and safety codes; excessive heat causes rashes, vomiting, and fainting; excessive cold necessitating outdoor winter gear to be worn at all times; vermin infestations; black mold; undrinkable water; over-crowding such that students lack seating; and leaks and falling plaster in classrooms).

257. *Id.* at 626–27 (describing, *inter alia*, lack of "books and materials needed to plausibly provide literacy," inaccessible libraries, and lack of basic supplies).

258. *Id.* at 638.

259. *Id.* at 642.

protection, they argued that defendants "discriminated against Plaintiffs by failing to provide the same access to literacy they give to other Michigan students."[260]

Beginning with the "negative rights" argument, the majority opinion for the Sixth Circuit recognized that "[c]ompulsory school attendance laws are a restraint on Plaintiffs' freedom of movement, and thus implicate the core protections of the Due Process Clause."[261] The court noted that "the important governmental interest" in public education meant the state "has the power to compel attendance at school" as a general matter.[262] However, the court found that this power is not unconditional. The court acknowledged that "some level of education . . . justifies whatever deprivation of liberty is caused by mandatory attendance," but reasoned that, consistent with due process, the state could not "forc[e] students to attend a 'school' in which they are simply warehoused and provided no education at all[.]"[263] Although the court upheld dismissal of this claim based on the deficiency of plaintiff's pleading,[264] it suggested that the applicable test was whether the deprivation of liberty bore a "reasonable relationship to the state's asserted purpose."[265]

Notably—and, in our view, correctly—the majority opinion in *Gary B.* rebuffed the dissent's argument that, under *Deshaney* and its progeny, *Youngberg*'s reasoning did not apply in the public school context.[266] *DeShaney* arose from a child's suit against the state after child protective services returned the child to live with his abusive father—despite the state's knowledge of the violence the child faced at home—after which the father inflicted extreme and debilitating injuries on the child.[267] In *DeShaney*, the Court found the child had not suffered an injury to his liberty within the meaning of the Due Process Clause: The *Youngberg* analysis was held to be inapplicable because the child was not in the state's custody at the time of the injury, and because the father was "in no sense a state ac-

260. *Id.* at 633.
261. *Id.* at 640.
262. *Id.*
263. *Id.*
264. The court found plaintiff's "factual allegations are insufficient to assess the viability of this claim." *Id.* at 641. Specifically, the court faulted the absence of allegations regarding "the duration or nature of the restraint faced in their schools, such as the hours per day of compulsory attendance, the number of days per year, or the restrictions on Plaintiffs' liberty throughout the typical school day." *Id.* at 642.
265. *Id.* at 641 (citing *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (applying the *Jackson* reasonable relation standard)).
266. *Id.* at 678 (Murphy, J., dissenting) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).
267. *DeShaney*, 489 U.S. at 191–94.

tor."[268] The Court noted that in limited circumstances, a "special relationship" may arise that generates affirmative duties to protect, but it found that the combination of knowledge of danger from private parties and the past steps taken to protect the child did not qualify.[269]

The dissent in *Gary B.* inaccurately characterized *Youngberg* as an "exception" to the *DeShaney* framework, rather than recognizing that it addressed a different issue. Judge Murphy's dissent reasoned that courts have "consistently rejected the argument that *Youngberg*'s custody exception [to the rule that a state has no duty to provide services] covers children based on compulsory attendance laws."[270] But the cases the dissent cited in support of this proposition all concern a distinct issue: whether a public school had a duty to protect a student from harm *at the hands of a private actor*, which required finding a "special relationship" between the state and the student.[271] The fact that courts generally have rejected such claims—finding that there is no special relationship between a public school and a student within the meaning of *DeShaney*[272]—says nothing about the liberty theory recognized in *Gary B.* (or that we advance in this section).[273] Regardless of whether the custodial control is as "strict" as that in *Youngberg*,[274] it is undisputed that there is *some* deprivation of liberty when children are compelled to attend public school.[275] To withstand constitutional scrutiny, that justification cannot exist only in theory.[276]

As to the "fundamental right" aspect of plaintiffs' due process claim, the court held that access to "a basic minimum education—one that can plausi-

268. *Id.* at 201.

269. *Id.* at 197–98.

270. *Gary B.*, 957 F.3d at 678, *citing Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 854 (6th Cir. 2016); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995); and *Doe v. Claiborne County*, 103 F.3d 495, 510 (6th Cir. 1996).

271. *See generally id.*

272. Some Circuit Courts of Appeal have categorically dismissed such claims, apparently based on a misreading of *Deshaney*, by reasoning that *Deshaney* required total physical custody over a person to trigger affirmative duties. *See, e.g.*, *D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (*en banc*). Others have made case-by-case determinations of whether a special relationship exists but have uniformly reached the same result. *See, e.g.*, *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995).

273. Indeed, none of the cases cited by the dissent discuss *Youngberg*.

274. *Gary B.*, 957 F.3d at 678 (Murphy, J., dissenting) ("[The *Youngberg*] exception generally applies only for those individuals under strict state control.").

275. *Id.* at 640 ("If the state required a group of people to sit in a building for several hours a day without any justification, such a restraint would clearly offend their right to liberty.").

276. The majority also concluded that even if *DeShaney*'s framework applied, the allegations satisfied the "state-created danger" doctrine. *Id.* at 658–59 (arguing the situation of under-resourced schools is "analog[ous] [to] a world in which the state took charge of the provision of food to the public . . . [and] then left the shelves on all the stores in one city bare, with no compelling governmental reason . . ., plac[ing] the residents of that city in heightened danger").

bly impart literacy—. . . is a fundamental right protected by the Due Process Clause."[277] After detailing the history of education in the states and in federal litigation regarding the quality and equality of its provision,[278] the court concluded that "literacy is foundational to our political process and society."[279] Emphasizing functional considerations, the court explained:

> Effectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts. . . . Even things like road signs and other posted rules, backed by the force of law, are inaccessible without a basic level of literacy. . . . Access to literacy also draws meaning from related rights, further indicating that it must be protected.[280]

In so reasoning, the court found that "access to literacy is itself fundamental because it is essential to the enjoyment of . . . other fundamental rights," drawing on both the equal protection and due process precedents.[281] The court concluded that plaintiffs' allegations, if proven, "demonstrate . . . depriv[ation] of an education providing access to literacy."[282]

Three weeks after the decision in *Gary B.*, and after four years of litigation, the parties reached a settlement.[283] The terms of that settlement include a commitment by the Governor, in the Governor's "sole discretion," to "diligently propose and support legislation" that will provide the Detroit public schools with a least $94.4 million for literacy-related programs; expressing agreement that the Detroit public schools will not be disqualified "from prequalifying and qualifying" for capital expenditure bonds; and the establishment of a Literacy Task Force and Educational Policy Committee with student, parent, teacher, and literacy expert-membership.

C. THE ANTI-CASTE PRINCIPLE AND THE SCOPE OF THE STATE'S DUTY

The confinement of children in carceral schools subjects them to unsafe physical environments, criminal sanction as a mode of punitive discipline, and sub-standard education that blocks personal growth, social and eco-

277. *Id.* at 655.
278. *Id.* at 650 (*citing* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 127–32 (2013)).
279. *Id.* at 652.
280. *Id.* at 653.
281. *Id*.
282. *Id.* at 661.
283. TERMS FOR SETTLEMENT AGREEMENT AND RELEASE BETWEEN ALL PLAINTIFFS AND THE GOVERNOR OF THE STATE OF MICHIGAN IN GARY B., ET AL. V. WHITMER, ET AL. SETTLEMENT TERM SHEET (May 13, 2020), http://www.publiccounsel.org/tools/assets/files/1382.pdf.

nomic advancement, and political participation. Moreover, the harms that flow from the violation of the children's liberty and equality go beyond the terms of their immediate confinement. Rather, carceral schools mark Black, Brown, and poor children as members of excluded classes whose life possibilities are narrowed and truncated. Framed within the theory of abolition constitutionalism, the central impact of the state's denial of the right to equal liberty is the state's consignment of the children to a lifetime of subordination and their permanent confinement in society's lowest tranche—in other words, the perpetuation of a race-and-class caste status that the Fourteenth Amendment was designed and intended to abolish.

Our yet-to-be-recognized federal right to education draws from and seeks to restore the anti-caste principle to its central role in the Reconstruction Amendments.[284] The interdiction against racial (and class) caste is clear from the Congressional discussion of the amendment. Certainly, before the Civil War, abolitionists understood slavery as a form of caste.[285] At a minimum, as Senator William J. Purman argued in defense of the Fourteenth Amendment, the anti-caste principle emphasized that "[c]olor is no crime, and the sacrilegious hands that would make it so . . . must be stayed[.]"[286] Senator Charles Sumner, one of the leading proponents of the Reconstruction Amendments, repeatedly referred to the abolition of caste as their core mission.[287] Indeed, he highlighted the public school as "the place to commence to break down caste."[288]

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284. *See* CAROL A. HORTON, RACE AND THE MAKING OF AMERICAN LIBERALISM ch. 1 *passim* (2005) (describing anti-caste constitutionalism as it took root before and after adoption of the Fourteenth Amendment). Prior to the Civil War, abolitionists characterized slavery as a form of caste. *See, e.g.*, Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's The Classical Liberal Constitution*, 8 N.Y.U. J. OF LAW & LIBERTY 839, 894 (2014), *quoting* Representative Norton Townshend, a Democrat from Ohio:

> I protest against . . . any interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; . . . Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust. . . .

(*citing* Cong. Globe, 32d Cong., 1st Sess. 713 (1852)).

285. *See* Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 12 (1983) (documenting that "both the statements of the author of the equal protection clause and the congressional debates leading to its submission to the states support an anti-caste interpretation"); *see also* Clark D. Cunningham and N.R. Madhava Menron, *Race, Class, Caste . . .? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1297 (1999) (stating that "[t]he use of 'caste' in Fourteenth Amendment jurisprudence has, of course, a long tradition, with origins in the Reconstruction Congressional debates on the amendment"); Scott Grinsell, *"The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendancy of Anticlassification*, 15 MICH. J. RACE & L. 317 (2010) (discussing caste in the amendment's debates as a metaphor for anti-subordination, and not of colorblindness).

286. *Congressional Record*, vol. 2, pt. 1 (1874), 425, *quoted in* HORTON, *supra* note 284, at 24.

287. *See* CHARLES SUMNER, *The Question of Caste*, *in* XVII CHARLES SUMNER: HIS COMPLETE WORKS 131-83 (Negro Universities Press 1969). *See also Adamson v. California*, 332 U.S. 46, 52 n.8 (1947) (quoting Sen. Sumner that the Fourteenth Amendment abolished "oligarchy, aristocracy, caste or

The anti-caste principle goes beyond current equality doctrine and resists any formal emphasis on colorblindness. Rather, it aims to transform, as Cass R. Sunstein has explained, "a social status quo that, through historical and current practices, creates a second-class status."[289] The status is perpetuated not through a single law or action, but rather through a system that, to borrow from Kenneth Karst, goes "well beyond the sum of its parts" in replicating the outcast status that the Fourteenth Amendment aimed to eradicate.[290] The anti-caste principle thus urges courts to treat as illicit laws and practices that reinforce forms of arbitrary subordination associated with race and class; enforcement of the anti-caste ban focuses on systemic injustice, not on the single invidious law or isolated discriminatory action.[291] A showing of current intentional discrimination is not required; as Isabel Wilkerson has put it, the anti-caste principle seeks to purge "the afterlife of pathogens" that continues to plague American society, even after they have been banished formally as a matter of law.[292]

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monopoly with peculiar privileges and powers"); AMERICA'S UNFINISHED REVOLUTION, *supra* note 103, at 232 (citing Sumner's statement, "The demon of Caste . . . must be destroyed").

288. Hearings on Amnesty Bill (Civil Rights Amendment), 42nd Cong. 384 (Jan. 15, 1872) (statement of Sen. Sumner, quoting letter received from Black man urging equality legislation), *quoted in* Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 390-91 (1999). Sumner further stated, in defense of the integrated common school:

> The common school is important to all; but to the colored child it is a necessity. Excluded from the common school, he finds himself too frequently without any substitute. . . . But even where a separate school is planted it is inferior in character. No matter what the temporary disposition, the separate school will not flourish as the common school. . . . White parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness. This decisive consideration completes the irresistible argument for the common school as the equal parent of all without distinction of color.

Hearings on Amnesty Bill to Remove Political Disabilities Imposed on Former Confederates by 14th Amendment (Civil Rights Amendment), 42nd Cong. 384 (Jan. 15, 1872) (statement of Sen. Sumner), quoted in Fair, *id*.

289. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2436 (1994).

290. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 274 (1983). *See also* Paul R. Dimond and Gene Sperling, *Of Cultural Determinism and the Limits of Law*, 83 MICH. L. REV. 1065, 1069 (1985).

291. *See* Daniel Kiel, *No Caste Here? Toward a Structural Critique of American Education*, 119 PENN ST. L. REV. 611, 613 (2015) (explaining that "[a] caste system uses a network of laws, policies, customs, and institutions collectively operating to ensure that certain groups remain in a predetermined status within society").

292. ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 3 (2020). For criticisms of the use of "caste" in this work, *see supra* note 26. Du Bois, like Wilkerson, spoke of caste, but, unlike Wilkerson, he associated "color caste" (as he called it) with "the birth of modern racism governed by law *and racial capital*." Anupama Rao, *The Work of Analogy: On Isabel Wilkerson's "Caste: The Origins of Our Discontents"*, L.A. REV. OF BOOKS (Sept. 1, 2020), https://lareviewofbooks.org/article/the-work-of-analogy-on-isabel-wilkersons-caste-the-origins-of-our-discontents/ (emphasis added). Wilkerson, by contrast, does not speak of capitalism at all. Her analysis is devoid of the "analytic [of] racialization," central to the concept of racial capitalism, marked by "the continuous process of ascription for the purposes of maintaining political and economic power." Malini

In *Plyler v. Doe*, the Court affirmed the anti-caste principle as an aspect of equality doctrine, holding that the state of Texas violated this ban when it withheld public schooling from children on terms available to the rest of the community because of the immigrant status of the student's parents.[293] The challenged law on its face did not bar immigrant children from the public schools; rather, it permitted localities to refuse to enroll the children or to enroll them but to charge tuition, and penalized districts that did accept such children by withholding state funding.[294] The Court held the Fourteenth Amendment made it impermissible for the state, by impeding the students' access to public schooling, to "impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status," and, by effect, to mark the children with a stigma that marred their ability to "live within the structure of our civil institutions."[295] The anti-caste principle thus rendered the law unconstitutional, notwithstanding the refusal of the *Plyler* Court to recognize education to be a fundamental right, or to treat immigrant children as members of a suspect class (so that the challenged law would have received strict scrutiny from the Court).[296] Later, in a case challenging a school bus fee that impeded an indigent child's access to public school, the Court acknowledged the force of the anti-caste principle, but found that the bus fee did not threaten "to promot[e] the creation and perpetuation of a subclass of illiterates" and so the principle was not violated.[297] *Plyler*, however, remains potent support for the anti-caste principle and its application to carceral schools. Indeed, as Justin Driver has emphasized, "[p]roperly understood," the *Plyer* decision "rests among the most egalitarian, momentous, and efficacious constitutional opinions that the Supreme Court has issued throughout its entire history."[298]

Traces of the anti-caste principle arguably are at work in Justice Thomas's concurring opinion in *Zelman v. Simmons-Harris*, involving a voucher

Ranganathan(@maliniranga),Twitter(Sept.19,2020,4:21PM), https://twitter.com/maliniranga/status/1307414515211001858.

293. *Plyler v. Doe*, 457 U.S. 202, 223 (1982). Congress later enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, which negatively impacted the rights of non-citizens, but neither statute abrogated the Court's core holding in *Plyler*.

294. *Id.* at 207.

295. *Id.*

296. *Id.* at 223.

297. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988). *See The Supreme Court, 1987 Term, Leading Cases, Access to Public Education*, 102 HARV. L. REV. 201, 208 (1987) ("Justice O'Connor essentially re-wrote *Plyler*, however, by focusing on Justice Powell's concurrence and the dissent in which she joined, rather than on the reasoning of the majority.").

298. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 316 (2018).

program that allowed inner-city children to transfer from low-performing schools to any school, including parochial schools.[299] Justice Thomas wrote:

> Frederick Douglass once said that "[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education* . . . that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them.[300]

He continued:

> The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.[301]

Justice Thomas supported this common sense understanding with data showing the relation between access to education and social mobility,[302] discussing empirical studies that confirm the generally strong relationship between education and "socioeconomic attainment."[303]

To these studies one can add numerous others that confirm the importance of higher education to expand life outcomes,[304] especially for

299. 536 U.S. 639, 682–83 (2002). This article does not address the constitutionality of including parochial schools in educational transfer programs.

300. *Id.* at 676.

301. *Id.* at 683.

302. *See id.* at 682–83 (stating that "a black high school dropout earns just over $13,500, but with a high school degree the average income is almost $21,000").

303. David B. Bills, *Credentials, Signals, and Screens: Explaining the Relationship between Schooling and Job Assignment,* 73 REV. EDUC. RES. 441, 441 (2003). *See* David Card, *Estimating the Return to Schooling: Progress on Some Persistent Econometric Problems* 69 ECONOMETRICA 1127 (2001) (reviewing a large body of academic research suggesting there is a strong causal relationship between increases in education and increases in earnings).

304. *See, e.g.*, Eric Grodsky & Julie Posselt, *Higher Education and the Labor Market*, *in* EDUCATION AND SOCIETY: AN INTRODUCTION TO KEY ISSUES IN THE SOCIOLOGY OF EDUCATION 283, 285–86 (Thurston Domina, Thurston Domina, Benjamin G. Gibbs, and Andrew Penner, eds., 2019) ("In addition to economic benefits, those who complete college experience a range of noneconomic benefits. Educational attainment is a critical social determinant of health, for example. Education in general, and college in particular, also contributes to the "diverging destinies" of American families, with patterns of marriage, marital timing and longevity, and fertility closely bound to college attendance and completion. College graduates are markedly less likely to be convicted of a crime or experience incarceration and are more likely to vote and show other evidence of civic engagement.") (citations omitted); Nathan Grawe, *EducationandEconomicMobility*,URBANINSTITUTE(2008), https://www.urban.org/sites/default/files/publication/31161/1001157-education-and-economic-mobility.pdf ("In the last 50 years, the college-high school wage premium has nearly doubled from

those from disadvantaged backgrounds.[305] Recognizing the importance of higher education only further underscores the need to invest in K-12 education: completion of, and success in, high school often determines access to higher education. For this reason alone, K-12 education is critical for increasing life outcomes of children in the United States. Moreover, studies show that quality primary and secondary education has the ability to increase mobility prospects for children by their own accord.[306] As the Fifth Circuit has stated, "every child deserves a shot at the American Dream—and the key to social mobility is a good education."[307] Provision of quality K-12 education, then, is the appropriate remedy for a violation of the children's equal liberty and supports the emancipatory, anti-caste goals of the Reconstruction Amendments.[308]

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around 30 percent to just over 60 percent, reaching levels not seen since the turn of the twentieth century. Not only do college graduates earn much more than high school graduates, but much of the returns appear to be caused by the college experience. There is little doubt that post-secondary schooling aids absolute mobility.") (citations omitted); Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 260 (2014) (explaining how higher education not only contributes to individuals' increased income but also contributes to "better personal, spousal and child health outcomes; children's educational gains; greater longevity, and even happiness.").

305. Michael Greenstone, Adam Looney, Jeremy Patashnik, and Muxin Yu, *Thirteen Economic Facts about Social Mobility and the Role of Education*, HAMILTON PROJECT (June 2013), https://www.brookings.edu/wp-content/uploads/2016/06/THP_13EconFacts_FINAL.pdf (explaining that data show "a college degree can be a ticket out of poverty" since "a low-income individual without a college degree will very likely remain in the lower part of the earnings distribution, whereas a low-income individual with a college degree could just as easily land in any income quintile—including the highest"); Michael J. Petrilli, *Education is Still a Sturdy Path to Upward Mobility*, FLYPAPER (Oct. 13, 2017), https://fordhaminstitute.org/national/commentary/education-still-sturdy-path-upward-mobility# ("[T]he overwhelming research consensus still stands: Students who attain valuable postsecondary credential have a much better chance of making it into the middle class and beyond.").

306. *See* Grawe, *supra* note 309, at 1 ("A sizeable majority of studies suggest school quality improvements [at the K-12 level] raise earnings supporting absolute mobility. Moreover, many studies find the effects are greatest among children in low-income families, suggesting greater relative mobility as well (though on this point there is disagreement)."); Anjaleck Flowers, *The Implied Promise of a Guaranteed Education in the United States and How a Failure to Deliver it Equitably Perpetuates Generational Poverty*, 45 MITCHELL HAMLINE L. REV. 1, 15 (2019) ("One of the strongest tools for breaking generational poverty and having a life of financial success is a quality education.") (*citing* Brian A. Jacob & Jens Ludwig, *Improving Educational Outcomes for Poor Children*, 26 FOCUS 56 (2009), https://www.irp.wisc.edu/publications/focus/pdfs/foc262j.pdf). However, schooling today has had only a "modest contribution to variation in intergenerational income transmission." *See* Jesse Rothstein, *Inequality of Educational Opportunity? Schools as Mediators of the Intergenerational Transmission of Income*, 37 J. LAB. ECON. S. 85, S122 (2019).

307. *Smith v. Sch. Bd. of Concordia*, 906 F.3d 327, 339 (5th Cir. 2018) (Ho, J., concurring).

308. James, *supra* note 108, at xxii ("Emancipation is *given* by the dominant . . . . Freedom is *taken* and created.") (emphasis in original); *see also* BLACK RECONSTRUCTION, *supra* note 105, at 201–02 (describing steps needed to "implement[] emancipation [to] mak[e] Negro freedom real").

IV. FROM RIGHT TO REMEDY: AN ABOLITIONIST APPROACH TO PUBLIC SCHOOLING

In this Part we move from the constitutional justification for a federal right to quality public schooling to judicial enforcement of such a right. The decision in *Gary B.*, because it was decided on appeal from the district court's dismissal, did not explicitly grapple with remedial questions. However, it is possible that concerns about remedial enforcement indirectly affected the court's decision to define a minimally adequate education in terms of basic literacy. Judicial hesitation of this sort is not unusual when pressed with "positive" claims that the government provide goods or services deemed to be fundamental. Standard objections usually include concerns grounded in judicial competence, for example, insisting that courts lack manageable standards to implement a right such as that to quality public schooling. Relatedly, critics argue that courts lack democratic legitimacy in enforcing such rights, because they are unelected and so presumed unaccountable, insisting, further, that even the declaration of such a federal right would undermine individual autonomy, run counter to federalism, and suppress efforts at social mobilization by politically marginalized people. The frame of abolition constitutionalism serves to question and helps to dispel each of these concerns.

A. EDUCATION REFORM, JUDICIAL COMPETENCE, AND DEMOCRATIC LEGITIMACY

Arguments against recognizing a federal education right generally are grounded in separation of powers and federalism, and focus on two presumed infirmities of the federal courts.[309] The first objection argues that federal courts lack institutional competence to adjudicate claims of "positive" rights,[310] emphasizing that the articulation of such rights requires expertise that either is beyond the judiciary's capacity or better exercised by the political branches.[311] The second objection argues that even if federal courts have the requisite capacity, it is democratically illegitimate and so counter-productive for unelected judges to order elected representatives,

309. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157–69 (1999) (discussing these objections to federal court recognition and enforcement of positive rights).

310. *See* Scott R. Bauries, *Foreword: Rights, Remedies, and* Rose, 98 KY. L.J. 703, 708 (2009–2010) (explaining that "a positive right theoretically allows its order to compel government action").

311. Hershkoff, *supra* note 309, at 1167.

especially state representatives, to provide a specified level of good or service that the judiciary cannot institutionally deliver on its own.[312]

The separation-of-powers argument about institutional competence attributes to the President and Congress a comparative advantage to the federal courts in devising and enforcing the kinds of policies that "positive" claims, such as a right to quality public schooling, entail. On this view, the elected branches can better assess societal problems because they hear directly from their constituents and can use institutional tools, including investigations and committees, to gather facts and expertise.[313] As such, legislators are said to respond to the authentic desires of the people and are able to avoid "one size fits all" approaches; instead, they can fine-tune solutions with greater granularity that take account of local conditions and needs. The elected branches also control taxing and other revenue-raising efforts and so can claim legitimacy as being held doubly accountable for their policy choices.[314] By contrast, the judiciary's lack of competence flows from the court's institutional structure and case-by-case approach, constrained by party initiative, rules of evidence, and stare decisis.[315] In particular, adjudication is said to be ill-suited to resolve disputes that have a polycentric structure (such as those involving public schooling) and that require the raising and expenditure of public money for remedial enforcement.[316] The capacity objection implicates the democratic objection. At a formal level, the judiciary's illegitimacy traces to Article III and the fact that federal judges lack electoral discipline at the ballot box.[317] A more nuanced objection focuses on the courts' reliance upon professional expertise and the mediation of popular voices through legal representation; from this perspec-

312. *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 893 (2001) (presenting an empirical argument against recognizing positive rights on the ground "that courts have not been very active in enforcing state constitutional positive rights and that the poor appear to be no better off in the presence of such rights").

313. *See* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1472–73 (2010) (discussing presumption of legislative superiority in the field of policy making and rules of judicial deference and restraint that have developed in response).

314. *See* Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 663 (1995) (stating that "one of the values most commonly associated in the modern world with legislation is democratic legitimacy").

315. *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1627 (2019) (observing that "litigation is limited by legal rules that are not necessarily designed to promote justice" including rules "exclud[ing] certain kinds of evidence," as well as more generally, the limits inherent in "resources and incentives of lawyers").

316. *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

317. *See* Carol Nackenoff, *Is There a Political Tilt to "Juristocracy"?*, 65 MD. L. REV. 139 (2006) (discussing conservative and liberal criticisms of unelected judiciaries). *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 18 (1962) (discussing federal judicial review as "counter-majoritarian" and "deviant" in a democracy).

tive, court proceedings are said to ignore or suppress community voices or those who lack adjudicative "equipage."[318] Relatedly, the constitutionalization of complex social and economic problems is said to distort democracy by displacing public deliberation, undermining autonomous decision making, ignoring federalism, and unintentionally generating backlash from voters whose views are ignored.[319] Critics thus argue that court-centric approaches to claims involving public schooling are ineffective because they inadvertently deflate political aspirations and sap energy from social movements.[320]

Our response to these concerns is that of confession and avoidance: We concede a measure of judicial incapacity and democratic illegitimacy, and move on. Those who take a functional, and not a formal, approach to separation of powers recognize that the purported comparative advantage of the elected branches rests on the Nirvana fallacy—ignoring legislative and executive defects while emphasizing those of the federal courts.[321] That Article III courts lack an electoral pedigree appropriately counts as only one factor among many in assessing democratic legitimacy; it is too late in the day to ignore political dysfunction and the failure of elected officials to hear and credit the views of Black, Brown, and poor constituents.[322] Indeed, it is the failures of the "democratic" branches that have motivated education advocates to seek judicial remedies, although some groups do so with hesitation and skepticism.[323] As for whether claims involving "positive" rights

318. *See generally* William Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

319. *See* Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship*, 69 FORDHAM L. REV. 1893 (2001) (discussing backlash to judicial recognition of social citizenship rights).

320. *See, e.g.*, Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577, 579-80 (2010) (stating that critics of judicially cognizable rights "have called attention to the empty formality, false neutrality, and constrained scope of rights defined through litigation," and the fact that "attorneys' professional interests and class-based political agendas, as well as the rules of doctrinal argumentation, constrain rights claims made by lawyers arguing in the courts").

321. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969) (explaining the fallacy as a "choice as between an ideal norm and an existing 'imperfect' institutional arrangement"). On the other hand, we recognize that heroic assumptions about judges, placing emphasis on their reliance on principle, rationality, and fairness, can verge on hyperbole. *See* Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (observing that "theorists frequently work with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters").

322. *See Gary B. v. Whitmer*, 957 F.3d 616, at 655, (stating that, "it is unsurprising that our political process, one in which participation is effectively predicated on literacy, would fail to address a lack of access to education that is endemic to a discrete population"); *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 241 (2d Cir. 2021) (upholding district court finding that a school board's election slating systematically "excludes minority-preferred candidates and minority voices from the slating process").

323. *See, e.g.*, Fatema Ghasletwala, *Examining the School-to-Prison Pipeline: Sending Students to Prison Instead of School*, 32 J. CIV. RTS. & ECON. DEV. 19, at 27, 29 (2018) (positing that "it would be

claims have a decision-making structure so unique as to render them non-justiciable, the concern seems overstated, given the ability of courts to address such complex problems as utility regulation, market concentration, and environmental impacts—indeed, if taken at face value, the criticism, as one commentator has stated, would require "locking up the courts" in almost all disputes that touch on social and economic concerns "and flinging the keys into the sea."[324]

To be sure, litigation depends on professional expertise; but, to borrow from Dorothy E. Roberts, lawyers can "help[] to articulate and present the demands of people subject to carceral punishment . . . —even when they anticipate failure."[325] Above all, the objection against having a federal court recognize and enforce a federal constitutional right to education ignores a key insight of abolition constitutionalism: the historic and continuing role of race and class in American governance, and the role of law in encouraging the creation of institutional arrangements for "a more humane, free, and democratic world."[326] Federal courts are an important actor in this constructive project, as they are for redressing the denial of equal libety. To exclude the courts would compound the constitutional harm: Black, Brown, and poor children would not only be confined in sub-standard and inferior public schools that perpetuate their subordinate status, but also blocked from challenging their detention.

B. THE ANTI-CASTE PRINCIPLE AS A MANAGEABLE STANDARD

The argument about judicial incapacity sometimes raises a separate objection to having a federal court recognize and enforce a federal right to education: namely, that the federal courts lack manageable standards to guide their decision-making. Thus, Derek W. Black has observed that the

illogical to expect a sensible, systemic remedy from the judiciary or legislators" for the school-to-prison pipeline that has developed in the wake of "lack of resources, race and socioeconomic status, and zero-tolerance policies, injunction with legislation and once-legal but now persisting structural discrimination").

324. Shivprasad Swaminathan, *What the Centipede Knows: Polycentricity and "Theory" for Common Lawyers*, 40 OXFORD J. LEG. STUDS. 265, 268 (2020) (*citing* JEFF KING, JUDGING SOCIAL RIGHTS 189 (2012)).

325. *See* Roberts, *supra* note 8, at 113 & note 706 (discussing the role of the National Conference of Black Lawyers in the racial justice movements of the 1960s and 1970s).

326. *Id.* at 12. *See* Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1087 (2018) (discussing slavery protection and the Electoral College); Sanford Levinson, *Still Complacent After All These Years: Some Rumination on the Continuing Need for a "New Political Science,"* 89 B.U. L. REV. 409, 418 (2009) ("The Senate, along with slavery, was one of the two "great compromises" that enabled the proposal and ratification of the Constitution. No one would think of praising the values undergirding chattel slavery today; one wonders exactly why the Senate is any different.").

lack of judicially managed standards was the "death knell"[327] of an equality-based right to public schooling in *San Antonio Independent School Board v. Rodriguez*.[328] An important response to this objection was developed during the 1960s by Frank Michelman, whose theory of "minimum welfare" drew from the liberal philosophy of John Rawls.[329] Under this approach to federal equal protection, the Constitution requires fulfillment of "just wants" that, in the aggregate, constitute a justiciable "just minimum" entitlement that courts can and should safeguard for the poor.[330] The "minimum welfare" approach carried the corollary that welfare rights should be expressed in parsimonious terms, positing that the need for manageable standards required that the court pitch the right at a subsistence level upon which all could agree and that would be capable of enforcement.[331]

To be sure, devising a federal constitutional education right as a right to basic literacy is consistent with the "minimum welfare" approach. However, the theory of "just wants" responded to the problem of wealth deprivation and how courts and law should respond to conditions of poverty—not to problems of racial discrimination or structural subordination. In his later writings, Rawls acknowledged that the ideal theory of justice—upon which Michelman based his approach to equal protection—did not address "serious problems arising from existing discrimination and distinctions based on . . . race."[332] Indeed, the ideal theory of justice could be applied only to a

327. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 730, 800 (2018).

328. 411 U.S. 1 (1973). *See also Melvin H. v. Atlanta Indep. Sch. Sys.*, No. 1:08-CV-1435, 2008 WL 11342510 (N.D. Ga. 2008) (discussing purported lack of manageable standards in suit by children challenging the adequacy of education provided in Georgia "alternative" education programs for "students who are suspended from regular classrooms").

329. JOHN RAWLS, A THEORY OF JUSTICE (1971); *see* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

330. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Michelman's account is the classic argument for heightened constitutional protections for poor persons against exclusionary majoritarian outcomes. Michelman explained that his theory reflected a moral intuition that the state should offer "minimum protection against economic hazard." *Id.* at 13. Economic hazard refers to instances where "persons have *important needs or interests* which they are prevented from satisfying" due to resource constraints. *Id.* at 35 (emphasis added). For an overview of arguments for positive rights that depend upon the existence of a minimum core of entitlement, *see* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE. J. INT'L L. 113 (2008).

331. *See infra* notes 365–366 and accompanying text.

332. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 66 (Erin Kelly, ed., 2001). *See* Charles W. Mills, *Retrieving Rawls for Racial Justice? A Critique of Tommie Shelby*, 1 CRIT. PHIL. OF RACE 1, 2 (2013) (discussing the "intellectual chasm between the worlds of the black American freedom struggle for justice and the white American academic philosophical community's discussions of justice"). Conversely, critical race scholars generally "have said very little about Rawls." Sheila Foster, *Race and Ethnicity, Rawls, Race, and Reason*, 72 FORDHAM L. REV. 1715, 1716 (2004).

democratic society, and not "a caste, slave, or racist one."[333] Without entering this debate, we note that sharp philosophical disagreements exist about the relation of Rawls' theory of justice to racial injustice in the United States.[334] At the least, the current situation of Black, Brown, and poor children in carceral schools raises questions about whether the "just wants" approach—and its justification for rights of minimal sufficiency—fits an abolitionist project that operates in a non-ideal society.[335]

Rather, as Judge Goodwin Liu has argued, we urge that construction of a "positive" right to quality public schooling, requiring affirmative provision by government, may be better understood in the light of history and tradition —what he referred to as "the shared understandings of particular social goods," taking into account democratic commitments as expressed in laws and regulatory programs.[336] In its history and tradition, education in the United States has been dual-edged: emancipatory in potential, subordinating in practice. American society generally recognizes the importance of education as a social good. However, public schooling works to control Black, Brown, and poor children for reasons that lack pedagogic justification. Understandings of the importance of public schooling thus have not truly been shared; to the contrary, they are radically incomplete for they exclude the views of marginalized groups from their construction.[337]

We urge, therefore, that the construction of a minimally adequate right to education be informed by the theory of abolition constitutionalism, rather

333. RAWLS, *supra* note 336, at 21. *See* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010) (arguing that racial justice is a matter of non-ideal theory).

334. Some scholars have argued that racial antidiscrimination norms are compatible with his approach, at least in terms of compensatory and not restorative justice. *Compare* Tommie Shelby, *Race and Social Justice: Rawlsian Considerations*, 72 FORDHAM L. REV. 1697 (2004) (offering a Rawlsian approach to achieving racial and arguing that the fair equality of opportunity principle could be adapted to "remove many of the socioeconomic burdens that racial minorities presently shoulder because of the history of racial injustice" and can "insure that their life prospects are not unfairly diminished by the economic inequalities that have been created by a history of racism."), *with* Mills, *supra* note 336. *See also* Martin D. Carcieri, *Rawls and Reparations*, 15 MICH. J. OF RACE & L. 267 (2010).

335. *See infra* Section IV(D).

336. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 228 (2008).

337. In blocking efforts to promote educational equality, the Court has deployed instrumental denial of this history, which Naomi Murakawa calls "practiced fantasies of racial innocence." Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473, 475 (2019) ("Racial innocence is the dominant US epistemology, a way of knowing fueled by the desire for unknowing. . . . Ignorance is no absence of knowledge; it is, rather, the cultivation of institutions, ideologies, and rhetorical mazes that unwitness racism[.]") (*discussing Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2007)); *see also* GEORGE SHULMAN, AMERICAN PROPHECY: RACE AND REDEMPTION IN AMERICAN POLITICAL CULTURE 134 (2008) (defining racial innocence as "partly, a denial of the reality of others and a disclaiming of this refusal [to acknowledge]; and, partly, a denial of the past that constitutes our situated particularity."); JAMES BALDWIN, THE FIRE NEXT TIME (1963) ("It is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime.").

than the ideal theory of just wants. In particular, public schooling, to be even minimally adequate, must account for the Fourteenth Amendment's ban on caste which forms the core of *Brown v. Board of Education*.[338] The anti-caste principle is sufficiently definite to provide federal courts with a manageable standard when devising and enforcing a federal right to a quality education.[339] As James E. Fleming has written,

> [Chief Justice] Warren articulate[d] a powerful conception of the harm of segregation in terms of an anti-caste principle of equal protection: "To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Therefore, Warren conclude[d], "[s]eparate educational facilities are inherently unequal."[340]

To be sure, the Court has moved away from this reading of *Brown*, substituting a version of equality that ignores structures of racial subordination and blocks even voluntary efforts at ending racial containment.[341] But the

338. Bryan K. Fair, *The Darker Face of Brown, the Promise and Reality of the Decision Remain Unreconciled*, 88 JUDICATURE 80, 82 (2004) ("*Brown* reaffirms Justice Harlan's Anti-Caste declaration [in his dissenting opinion in *Plessy v. Ferguson*"); Paul Dimond, *The Anti-Caste Principle*, 30 WAYNE L. REV. 1, 23 (1983) ("The school segregation cases eventually provided the most direct avenue for challenging the Court's early decisions embracing caste.").

339. A part of Michelman's defense of the minimum core concept was to render the concept of welfare rights justiciable, and that aim, as William Forbath has argued, led to his having too narrowly defined the core and ignoring that in the American tradition, welfare rights require "more than a decent minimum of food, shelter, and other material goods." William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 49 FORDHAM L. REV. 1821, 1876 (2001); *see also* William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969–Present*, 39 TULSA L. REV. 597, 622 (2004) (explaining that justiciability was the basis for Michelman's seeking constitutional welfare rights in terms of an insurance right rather than as a broader right of social citizenship). In response, *see* Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship*, 69 FORDHAM L. REV. 1893 (2001) (questioning the conflation of justiciability and narrowness of conception, and predicting that the more expansive social citizenship right would be blocked by "democratic-based resistance"). *See also* Donald D. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 702 (1992) ("Although a finding of caste-creating and cast-perpetuating conditions rests in part on qualitative judgments about a combination of factors, the standard of extreme dehumanization, powerlessness, and exclusion is nevertheless a manageable one for courts.").

340. James E. Fleming, *Rewriting* Brown, *Resurrecting* Plessy, 52 ST. LOUIS U.L. J. 1141, 1142 (2008), *citing Brown v. Board of Educ.*, 347 U.S. 483, 494, 495 (1954).

341. *See, e.g.*, Cedric Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 477 (2014) (stating that "Justice Thomas and the Roberts Court would say that it is time to move on: the formal signs of the state caste system have been removed and there is nothing to remedy[.]"); Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next*, 25 A.S.U. L. REV. 121 (1997) ("One reason we have lost so much ground is because the Court has returned to the definition of equality captured in *Plessy*, while, at several turns, explicitly undermining the anti-caste meaning of *Brown*."). Use of the courts to establish the right we describe would require confronting and overturning some precedents—perhaps most notably, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 127 S. Ct. 2738 (2007). *Parents Involved* renders vulnerable any effort to grapple with the legacies of racial subordination in and through schools by misappropriating *Brown*'s stig-

anti-caste principle of *Plyler* remains an intact doctrine, and within an anti-caste frame, public schools cannot be called even minimally adequate if they afford students no more than the literacy said to be necessary for democratic participation. Rather, the basic education right is one that liberates Black, Brown, and poor children from schools that perpetuate and entrench lifelong disadvantage, and transforms those carceral schools into sites for human flourishing.[342]

One might argue that this approach to a federal education right treats too lightly the court's lack of enforcement power. Admittedly, there may be gaps between the court's declaration of a right and its capacity to implement the right. However, the existence of the enforcement gap does not justify diluting the declaratory content of the right. Rather, it suggests the need for courts to work in partnership with other juridical actors to effectuate the right. These actors include elected officials; also, they include mobilized communities pursuing the abolitionist project of dismantlement and transformation. Indeed, courts should not unilaterally assume the responsibility of effectuating the education right. But we emphasize, as Gene Sperling has warned, "[t]o allow . . . remedial considerations to trim rights is to allow the depth of past wrongs and majoritarian hostility or unwillingness to bear remedial costs to be instrumental in narrowing present and future rights."[343]

Indeed, experience suggests that defining a "positive" right—whether constitutional or statutory—in terms of a minimum core or as minimal sufficiency tends to exert downward hydraulic pressure on the further elaboration and construction of that right, at least when implementation involves important questions about race and poverty.[344] We provide two examples: one from the federal "food stamp" program and the statutory right to food assistance, and the other from the experience of the South African Constitutional Court enforcing a constitutional right to housing and medicine. Both, we submit, highlight the considerable dangers that can result from a court's defining a positive right in the most minimal and narrow terms.

matic harm theory of race-based classification, *see id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment), and applying it to block desegregation efforts.

342. We underscore that even in the absence of manageable standards, declaring the education right would remain a viable judicial prospect given the "benefit to be achieved'' in terms of children's development and improved life changes. *Vieth v. Jubelirer*, 541 U.S. 267, 301 (2004).

343. Gene B. Sperling, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741, 1742 (1987).

344. *See* David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 597 (2008).

1. Minimal Sufficiency and the Provision of Food in the United States

The United States Constitution does not guarantee a right to food assistance, even if an individual is destitute and starving for reasons out of that person's control.[345] However, over the years, the federal government has developed programs to provide some food assistance to indigent persons.[346] Initially the federal government, like the states, limited assistance to the distribution of surplus food—bitterly memorialized by Malcolm X.[347] During the 1960s, the United States shifted toward programs that use a market-based approach with the aim of boosting the purchasing power of participating households to buy groceries.[348]

The Supplemental Nutrition Assistance Program (SNAP), originally called the Food Stamp Program, illustrates use of a minimum core approach to social service delivery. SNAP provides targeted assistance to indigent households that are then able to purchase food in grocery stores; the level of assistance is pitched at that of minimal sufficiency. In particular, SNAP builds upon an an Economy Food Plan developed by Mollie Orshansky, an economist and statistician who worked at the U.S. Department of Agriculture and later at the Social Security Administration. Orshansky designed the Economy Food Plan based on food and other consumption data in the 1955 Household Consumption Survey; she viewed viewed food consumption under the plan as a temporary and highly constrained expedient for "emergency use when funds are low," and by households that could spend "a considerable amount of [time on] home preparation with little waste and . . . [had] skill in food shopping and preparation."[349]

Food assistance to the needy continues to adhere to the basic parameters of this minimal approach. Yet the underlying basis of the Economy Food Plan has long been known to understate even subsistence needs and to be out of date (the current poverty threshold consists of three times the cost of

345. *See* Jesse Burgess, *Let Them Eat Cake: Constitutional Rights to Food*, 18 WILLAMETTE J. INT'L L. & DISP. RESOL. 256 (2010).

346. For an overview of these programs, *see* HERSHKOFF & LOFFREDO, *supra* note 159, at 243–327.

347. MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X AS TOLD TO ALEX HALEY 14 (1987) ("It seemed that everything to eat in our house was stamped Not To Be Sold. All Welfare food bore this stamp to keep the recipients from selling it. It's a wonder we didn't come to think of Not To Be Sold as a brand name.").

348. For a history of the Food Stamp Program, *see* ARDITH L. MANEY, STILL HUNGRY AFTER ALL THESE YEARS: FOOD ASSISTANCE POLICY FROM KENNEDY TO REAGAN (1989); *see also* JANET POPPENDIECK, BREADLINES KNEE-DEEP IN WHEAT: FOOD ASSISTANCE IN THE GREAT DEPRESSION (1986).

349. *See* Kenneth Hanson, *Mollie Orshansky's Strategy to Poverty Measurement as a Relationship Between Household Food Expenditures and Economy Food Plan*, 30 REV. OF AGRIC. ECON. 572 (2008).

the food plan).[350] Unquestionably, SNAP benefits reduce some food insecurity for participating households;[351] SNAP also supports the agricultural economy, improves neighborhoods, and lifts some families out of poverty.[352] However, benefits average about $1.40 per person per meal and, not surprisingly, typically are exhausted early in the allotment period given the actual cost of groceries. Reports indicate that these food shortages have serious negative effects on children who are more likely to face school discipline and earn lower test scores during the later parts of a SNAP monthly cycle.[353]

Over the years, analysts have encouraged replacing the food plan upon which SNAP assistance levels are based.[354] Although SNAP demonstrably improves the life chances of participants, Congress not only has resisted adapting the food plan, but also has imposed and extended coercive work requirements on participants—requirements that are known to have disparate and racialized exclusionary effects.[355] Moreover, although white households make up the majority of SNAP recipients,[356] negative stereotypes of Black people, and especially of Black males, tend to drive many public discussions of the program.[357] For example, President Reagan's first Inau-

350. Rebecca M. Blank, Testimony: Why the United States Needs an Improved Measure of Poverty, Brookings Inst. (July 17, 2008), https://www.brookings.edu/testimonies/why-the-united-states-needs-an-improved-measure-of-poverty/ ("While this methodology for calculating a poverty line was fine in 1963, and was based on the best data available, it is seriously flawed in 2008. There is no other economic statistic in use today that relies on 1955 data and methods developed in the early 1960s.").

351. Caroline Radcliffe, Signe-Mary McKernan, and Sisi Zhang, *How Much Does the Supplemental Nutrition Assistance Program Reduce Food Insecurity?*, 93(4) AM. J. AGRIC. ECON. 1082 (2011).

352. *See* U.S. Dep't of Agriculture, Economic Research Service, Economic Linkages: Supplemental Nutrition Assistance Program (SNAP) Linkages with the General Economy (2019), https://www.ers.usda.gov/topics/food-nutrition-assistance/supplemental-nutrition-assistance-program-snap/economic-linkages/.

353. *See* Steven Carlson, More Adequate SNAP Benefits Would Help Millions of Participants Afford Food, Center on Budget and Policy Priorities (July 30, 2019), https://www.cbpp.org/research/food-assistance/more-adequate-snap-benefits-would-help-millions-of-participants-better.

354. Such efforts include the Food Security Improvement Act or the Closing the Meal Gap Act. For a summary of legislative developments, *see* Food Research & Action Center, *SNAP/Farm Bill*, https://frac.org/action/snap-farm-bill.

355. *See, e.g.*, Erin Brantley, *Association of Work Requirements with Supplemental Nutrition Assistance Program Participation by Race/Ethnicity and Disability Status, 2013-2017*, JAMA NETWORK OPEN (June 26, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2767673.

356. *See* Center on Budget and Policy Priorities, SNAP Helps Millions of African Americans (Feb. 26, 2018), https://www.cbpp.org/sites/default/files/atoms/files/3-2-17fa4.pdf (finding Black people made up 26% of SNAP participants in 2016 based on available data).

357. *See* P.R. Lockhart, *Republicans Say Race Isn't a Factor in the Food Stamp Debate. Research SuggestsOtherwise*.,VOX(June13,2018), https://www.vox.com/policy-and-politics/2018/6/13/17460362/race-food-stamps-snap-farm-bill-2018-republicans-welfare (reporting the statement of Rep. David Scott (D-GA), who is Black, that 'The image of able-bodied men not working are African-American men in the minds—not in everybody's minds, but there are unfortunately people out there who have this mental disposition'"); Martha R. Mahoney,

gural Address, attacking the legitimacy of the Food Stamp Program, relied on racist tropes, referring to a "'strapping young buck' [who] bought T-bone steaks with food stamps."[358]

To be sure, funding for food assistance has expanded significantly over the years: In 2018, the United States spent $68 billion on SNAP and other food assistance, such as free and reduced-price breakfast, lunch, and snack programs for school-age children, assisting 40 million low-income people.[359] Notwithstanding the acknowledged nutritional, social, and health benefits of these programs, the level of assistance continues to be set at what is needed on a temporary, emergency basis, and does not meet nutritional need—in 2019 more than 37 million people in the United States reported being food insecure.[360] Program rules also share an unfortunate relationship with the carceral state (for example the SNAP program's onerous exclusions of persons who have had contact with the criminal law system[361]). Moreover, some commentators argue that the programs indirectly bolster the system of racial capitalism, for they effectively subsidize service and other low-wage industries that resist increasing hourly rates of pay for workers whose poverty wages are supplemented by the government.[362] The programs have lifted some recipients out of poverty, but the legislature's minimum core approach has not catalyzed or transformed into a more humane food policy.[363] Instead, SNAP benefits come at a significant price to recipients, who by program design are under constant suspicion of fraud,

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Segregation, Whiteness, and Transformation, 143 U. PA. L. REV. 1659, 1683 (1995) ("Programs like public housing, Medicaid, welfare, and food stamps have become publicly "raced" and endowed with a racial character (marked as nonwhite) in white perception and in much political discourse despite the fact that whites are at least a plurality of the beneficiaries.").

358. LeLand Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. OF LEGAL COMMENT. 299, 311 (2009) (noting that while "[r]ace was not mentioned, but the connotation was clear"—Reagan referred to an "able-bodied African American who was taking advantage of the system.").

359. Center on Budget and Policy Priorities, Policy Basics: The Supplemental Nutrition Assistance Program(SNAP),https://www.cbpp.org/research/food-assistance/policy-basics-the-supplemental-nutrition-assistance-program-snap.

360. *America at Hunger's Edge*, N.Y. TIMES MAGAZINE (Sept. 2, 2020), https://www.nytimes.com/interactive/2020/09/02/magazine/food-insecurity-hunger-us.html ("In the pandemic economy, nearly one in eight households doesn't have enough to eat.").

361. HERSHKOFF & LOFFREDO, *supra* note 159, at 254 (discussing rules governing disqualification for SNAP assistance because of certain contacts with the criminal system).

362. *See* Candace Kovacic-Fleischer, *Food Stamps, Unjust Enrichment, and Minimum Wage*, 35 LAW & INEQ. 1, 21 (2017) ("The retailers' profitability is therefore in part a result of the government subsidies the retailers receive through food stamp payments to their employees, a program designed to help the poor.").

363. *But see* Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1708 (2012) (suggesting that because the federal government has enacted food assistance program, recognizing that it is "unacceptable" to allow "citizens to starve," then the "courts can recognize" a right to subsistence "without creating administrative difficulties").

expected to comply with coercive and complicated regulations, and made to feel stigmatized and devalued, even as they continue to suffer from food insecurity.[364]

2. Minimal Sufficiency and the Provision of Housing

The South African Constitutional Court, influenced by developments in the international human rights regime, famously experimented with judicial enforcement of a positive right to a subsistence floor. Shortly before South Africa drafted its post-Apartheid Constitution, the United Nations Committee on Economic and Social Rights became the first international body to recognize a minimum core by articulating a state duty to provide "minimum essential levels" of food, health care, shelter, and housing.[365] The Committee's notion of minimum essential levels was a true "subsistence floor"—what Samuel Moyn described as "a minimum within a minimum."[366] In other words, although the right to housing or food might sweep more broadly—and take longer to fulfill—than the "minimum core," national governments bore "obligations which are of immediate effect" to provide goods or services sufficient to satisfy that core.[367] In a notable departure from the norm for human rights advisory bodies, the Committee called for judicial enforcement of an immediate right to a minimum core.[368]

South Africa's post-Apartheid Constitutional Court partially took up the call.[369] In the leading case known as *Grootboom*, the Court recognized, in principle, that a minimum core right to housing may eventually be identi-

364. *See* Tianna Gaines-Turner, Joanna Cruz Simmons, and Mariana Chilton, *Recommendations from SNAP Participations to Improve Wages and End Stigma*, AM. J. PUB. HEALTH (Dec. 2019), https://ajph.aphapublications.org/doi/epub/10.2105/AJPH.2019.305362.

365. U.N. Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations under art. 2(1)*, E/1991/23, ¶ 10 (14 December 1990) [hereinafter *General Comment No. 3*]; *see also Acevedo Buendia et al. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment Series C (ser. C) No. 198, ¶ 102, Inter-American Court of Human Rights (July 1, 2009) (embracing this standard).

366. SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 200 (2018) [hereinafter NOT ENOUGH].

367. *General Comment No. 3*, *supra* note 369, at ¶ 1.

368. *Id.* at ¶ 5.

369. This section focuses on South Africa as an illustrative example because South Africa's experience with enforcement of minimum levels of social protection through constitutional litigation is perhaps the "most famous" example—and in any event, it is one that Michelman and other U.S. proponents of social minimum protections looked to for inspiration. NOT ENOUGH, *supra* note 370, at 199–200. Other countries that have developed variations on the minimum core concept include Germany and Kenya. *See, e.g.*, Ingrid Leijten, *The German Right to an* Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, 16 GERMAN L.J. 23 (2015) (Germany); Nicholas Wasonga Orago, *The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution*, 59 J. AFR. L. 237, 245 (2015) (Kenya).

fied, but declined to define the content of the right or hold that the government had failed to fulfill it.[370] Still, it found that the government had failed to make "reasonable" accommodations for "categories of people in desperate need."[371] On this basis, the Court struck down a housing development program but left open for political decision-making precisely what level of provision would be "reasonable."[372] Since *Grootboom*, the concept of safeguarding "basic necessities" or "minimum levels" of public provision has featured prominently in South African constitutional case law.[373]

The promise and limits of the Constitutional Court's approach is well illustrated by the case of *Treatment Action Campaign* (*TAC*) and its legacy in South Africa's socio-economic rights jurisprudence.[374] *TAC* concerned the government's failure to provide anti-retroviral (ARV) medication to prevent mother-to-child transmission of HIV amidst one of the worst HIV/AIDS epidemics in the world.[375] As told by one of TAC's founders, the campaign for a program to stop mother-to-child transmission "galvanize[d] a social movement that was made up of people who were predominantly poor, Black, and living with HIV" to "mobilize around material needs, rather than general and abstract complaints of inequality."[376] The combined mobilization and litigation strategy paid off. The Constitutional Court found that the Government "fail[ed] to address the needs of mothers and their newborn children who do not have access" to the limited sites where the ARV medication was available. The Constitutional Court ordered the Government to make the drug widely accessible to the public health system, invoking the notion of entitlement to a "basic level" of healthcare provision.[377]

370. *Government of the Republic of South Africa v. Grootboom,* 2001 (1) SA 46 (CC) at ¶¶ 29–33 (CC) (S. Afr.). The court found it did not have sufficient information to determine what the content of the right would be—in part because the Government had so far made "no provision . . . for relief." *Id.* ¶ 69.

371. *Id.*

372. *Id.* at ¶ 99. For a broader discussion of the South African Constitutional Court's jurisprudence, *see* Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 165 (2006).

373. Formally, the court has refused to define the content of a minimum core in any given area, but regularly makes reference to a requirement to provide a minimum level of necessities. *See, e.g.*, *Khosa v. Minister of Social Development*, 2004 (6) SA 505 (CC) at ¶ 52 (S. Afr.) ("A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.").

374. *Minister of Health v. Treatment Action Campaign (TAC)*, 2002 (5) SA 721 (CC) (S. Afr.).

375. Mark Heywood, *South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health*, 1(1) J. HUM. RTS. PRACTICE 14, 19–20 (2009) [hereinafter *Law and Social Mobilization*].

376. *Id.* at 20.

377. *See TAC*, *supra* note 378, at ¶ 28 ("No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court."). While formally not relying on the "minimum core" concept, the Court enforced a floor of provision. *See generally* Mark Heywood, *Preventing Moth-*

Despite hopes that the case and strategy could herald a broader redistributive turn in constitutional law and politics, *TAC* represented the high-water mark, rather than a catalyzing starting point, for securing socio-economic rights under South Africa's Constitution. Seven years after the court victory, *TAC*'s founders continued to insist on an understanding of the case and surrounding developments as fundamentally "redistributive," arguing that it could serve as a "model" for campaigns in education, housing, and other areas.[378] Today, however, even the greatest proponents of the *TAC* "model" of popular mobilization around a minimum constitutional entitlement admit that the social and political formations they relied on are "almost completely powerless" in the face of today's "inequalities."[379] The Constitutional Court's experiment with socio-economic rights enforcement ultimately proved better tailored to "includ[ing] groups into the social and economic status quo" who were previously entirely excluded, rather than "fundamentally disrupt[ing] or transform[ing] that status quo."[380]

The South African experience with enforcement of a "minimum core" raises concerns about the incompatibility of such an approach with the emancipatory aspirations of abolition constitutionalism. The court's focus on basic necessities is indicative of a modest agenda inconsistent with the pursuit of systemic changes that implicate redistributive questions and, as Katharine Young has warned, "misses the important connections between dignity and human flourishing."[381] In fact, the approach may justify institutional arrangements that further subordinate, leading, in the words of South African political activist Jeremy Cronin, to a "two-faced developmental state," in which:

> [o]n the one hand, a "first world" state, with relatively well-resourced departments and state-owned enterprises whose principal mission is to remove market constraints[and] lower[] the cost of doing business (for

er-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health, 19 S. AFR. J. HUM. RTS. 278 (2003).

378. Heywood, *supra* note 379, at 23–30.

379. Mark Heywood, *The Transformative Power of Civil Society in South Africa: An Activist's Perspective on Innovative Forms of Organizing and Rights-Based Practices*, 17:2 GLOBALIZATIONS 294, 297 (2020). Nevetheless, recognition of the existence of a positive right, even one pitched at the level of minimal sufficiency, could have legal effects outside of public law and impact the shape and content of private law doctrines involving contract and tort. For arguments to this effect, *see* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional and Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010); Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 268–302 (Varun Gaui & Daniel M. Brinks eds., 2010).

380. Catherine Albertyn, *Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice*, 34(3) S. AFR. J. HUM. RTS. 441, 459 (2018).

381. Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 130–31 (2008).

> business). On the other hand, a "caring" but woefully under-resourced and overwhelmed "third world" state, focused on delivery to the poor.[382]

Further, insofar as inequality is "heightened by—or indeed constituted by—waiting," the very minimalism of the core itself runs the risk of entrenching inequality.[383] Under the mainstream international human rights interpretation of the minimum core, "the obligations left out of the 'core' are those with lesser priority."[384] Although it is widely recognized that securing social and economic rights requires mobilization from organizers,[385] the minimalism of the core in p ractice has y exerted a demobilizing effect on transformative movements.[386] Nor is the critique of the core approach simply a critique of judicialization: as with the United States' experience with food assistance, even when basic minima are secured through politics—such as with the African National Congress's heralded campaign pledge to provide Johannesburg residents with a "free basic amount of water" and other utilities—the results have been disappointing.[387] In South Africa and elsewhere, provision for a "social minima" has "proven compatible with the expansion rather than the reduction of material inequality."[388]

C. THE ANTI-CASTE PRINCIPLE AND FEDERALISM

Our emphasis that a minimum federal education right is one that promises a right to quality education also draws support from federalism. This argument may seem surprising. Conventionally, federalism is raised as a barrier to recognizing "positive" federal constitutional rights, on the theory that states and localities ought to have autonomy in deciding which goods

382. Jeremy Cronin, *The Dangers of Two-Faced Development*, MAIL & GUARDIAN (June 1, 2007), https://mg.co.za/article/2007-06-01-the-dangers-of-twofaced-development/.

383. Katherine G. Young, *Waiting for Rights: Progressive Realization and Lost Time*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 654, 666 (Katherine G. Young, ed., 2019). The tragic consequences of waiting are illustrated by the afterlife of the *Grootboom* case itself. Despite her victory in court, Irene Grootboom was still homeless and impoverished when she died eight years after the Constitutional Court's decision.

384. *Id.* at 667; *see also* Theunis Roux, *Understanding* Grootboom-*A Response to Cass R. Sunstein*, 12 CONST. F. 41, 46–47 (2002) (suggesting a priority-setting approach for determining "the temporal order in which government chooses to meet competing social needs," guided by the minimum core concept articulated by the Committee); John Tasioulas, Minimum Core Obligations: Human Rights in the Here and Now, World Bank Research Paper (Oct. 2017).

385. Angelina Fisher, "Minimum Core" and the "Right to Education," World Bank Research Paper 33 (Oct. 2017) ("[*C*]*itizen demand* is critical to the successful outcome.") (emphasis in original).

386. Patrick Bond, *Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa*, 41:3 POLITIKON 461, 463, 472–73 (2014) (listing examples of activists associated with major constitutional litigation campaigns in South Africa).

387. *Id.* at 473–74 (explaining that "for many poor people there was no meaningful difference to their average monthly bills even after the first free 6000 litres" because of compensating price increases in the second "block").

388. NOT ENOUGH, *supra* note 368, at 66.

and services to provide to residents at public expense.[389] Additional normative justification focuses on the desire for localized self-governance, on the view that states require political space to function as "laboratories of experimentation."[390] This argument, however, looks at federalism from only one end of the spectrum. It does not ask, and so leaves unanswered, how state and local experimentation in turn might affect federal constitutional interpretation.

Students of federalism have begun to examine and in some contexts, to see the value of having the Supreme Court look to, and learn from, state constitutional law in its interpretation of the U.S. Constitution. Thus, for example, Joseph Blocher asks, "If states have a constitutionally guaranteed role as laboratories for constitutional innovation, why does the Court discard the lab results?"[391] In areas in which the federal and state constitutions overlap—for example, in criminal procedure—the Court already has undertaken what Blocher calls "reverse incorporation."[392] In these areas, evidence of local practice has provided the federal system with important information pertinent to constitutional interpretation.[393] Similarly, the First Amendment is a doctrinal space in which the Court routinely looks to "community values" in determining the appropriate meaning of the expressive right[394] and state definitions of property and liberty likewise inform the federal conception of due process.[395]

Notwithstanding that these pockets of reverse incorporation appear in fields where the federal and state constitutional provisions overlap, two features make public schooling a plausible candidate for reverse incorporation of this type. As the conventional arguments against recognizing a fed-

389. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 5 (2003) ("Americans want neighborhood schools, decentralized decision-making, and democratic control. . . . They simply will not permit distant politicians or experts in a centralized civil service to make educational decisions.").

390. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) ("Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.") (internal citation omitted).

391. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 326 (2011).

392. *Id.* at 372 (discussing the Court's reliance on state judicial practice in the area of criminal procedure in shaping the content of Fourth Amendment rights).

393. *See* Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855, 860 (2019) (justifying "robust use of local evidence" to "define" the federal constitutional right).

394. *See generally* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473 (1997).

395. *See generally* Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77 (1982).

eral right—lack of competence and democratic legitimacy—make clear, K–12 education is a field in which the Court has exercised restraint out of deference to expertise and federalism.[396] In the half century since the Supreme Court's decision in *Rodriguez*, state courts have been active players in federalist experiments and they have developed robust principles regarding a right to education. Indeed, state courts have advanced a conception of a public schooling right—as the discussion of the *Rose* and *Hunt* litigations made clear[397]—that goes far beyond a right to mere literacy. The approach taken in this line of cases has obvious resonance with Amartya Sen's and Martha Nussbaum's theory of capabilities, which forges a link between material welfare and human liberty.[398] Under Sen's approach, capabilities are "substantive freedoms" that enable the achievement of "functionings," which are "beings and doings" essential to human flourishing (such as being educated, being fed and housed, voting, working, etc.).[399] Education has been at the "heart" of the "capabilities approach" since its inception.[400] The approach taken by state courts in the *Rose* line of cases is consistent with capabilities theorists who favor ensuring that every person be given an opportunity to flourish in society—an aspiration that goes to the core of the anti-caste principle.[401]

Establishing a federal right to a quality education would build upon these state experiments, whereas declaring the right at too low a level of sufficiency could suppress their results. Judge Jeffrey S. Sutton, in his discussion of state school funding challenges, has argued that the failure of a federal constitutional right in *Rodriguez* created political and legal pressure in the states to step into the gap.[402] He asked whether these reform move-

396. *See* Blocher, *supra* note 395, at 375 (stating that "criminal procedure is one of those areas in which the underlying values of reverse incorporation—respect for federalism and state expertise, for example—are particularly salient").

397. *See supra* notes 52–67 and accompanying text.

398. Amartya Sen, *Justice: Means Versus Freedoms*, 19 PHIL. & PUB. AFF. 111, 118 (1990) ("Capability reflects a person's freedom to choose between alternative lives"); *see also* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 78–80 (2000) (listing ten capabilities that all democracies should promote because of their necessity to human flourishing: "(1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; (10) control over one's environment").

399. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 18, 70–86 (1999); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 201-03 (1985).

400. MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 152 (2011); *see also* AMARTYA SEN, INEQUALITY REEXAMINED 44 (1992) (listing education as one of "a relatively small number of centrally important" beings and doings).

401. Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 554 (2012) ("[Capabilities approach] is generally committed to the equal protection of rights for all up to a certain minimum threshold.").

402. *See generally* 51 IMPERFECT SOLUTIONS, *supra* note 62. The idea of states "stepping into the breach" draws from Justice Brennan's germinal article, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

ments, developed by state legislatures and ordered by state supreme courts, would have happened had the *Rodriguez* Court announced a right to education. Emphasizing that the definition of such a right would have been "diluted" by the Court's sense of "institutional constraints," Judge Sutton referred to a "federalism discount to [the Court's] articulation of the constitutional right and remedy."[403] Given this pattern of state court decision-making we urge that federalism provide a bonus to the federal definition of an education right, just as state practice boosted the Court's recognition of a right to counsel under the Sixth Amendment.[404] The capabilities-oriented education rights recognized under state constitutions highlight that to be adequate the education afforded to Black, Brown, and poor students—as to all students—must ensure an equal chance at achieving the capacities essential to human flourishing and to eliminate caste.

D. THE LIBERTY-BASED RIGHT TO QUALITY EDUCATION AND THE BROADER ABOLITIONIST PROJECT

In this section, we continue with the theme of implementation, with an eye towards efforts at social mobilization. We do not presume to put forward anything approaching a comprehensive plan for the abolition we propose. For too long Black, Brown, and poor young people and their families have been locked out of political decisions affecting their futures. We recognize that any abolitionist project must move forward in a manner that promotes, rather than undermines, self-determination.[405] However, a brief survey of salient features of abolitionist organizing and organizing against carceralism in schools reveals significant alignments between the demands of popular movements and potential advocacy for the federal right we describe.[406] Indeed, a conception of freedom aligned with our notion of liberty has long been central to the Black feminist tradition[407]—a tradition that is a

403. 51 IMPERFECT SOLUTIONS, *supra* note 62, at 36–37. *See* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1314 (2019) (discussing this feature of Judge Sutton's argument).

404. *See* Blocher, *supra* note 395, at 374 (discussing case law).

405. Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms, Abolitionists Demands*, STAN. J. C.R.-C.L. (forthcoming) (draft on file with author) [hereinafter *Abolitionist Demands*] (listing as one of the "elements for transformative reforms that advance an abolitionist horizon" that "the reform builds and shifts power into the hands of those directly impacted, who are often Black, brown, working class, and poor").

406. For an argument for the importance of such alignment, *see* Amna Akbar, Sameer Ashar, and Jocelyn Simonson, *Movement Visions for a Renewed Left Legalism*, L. & POL. ECON. BLOG (Mar. 5, 2019), https://lpeproject.org/blog/movement-visions-for-a-renewed-left-legalism/ ("[W]e believe a left political agenda must be grounded in solidarities with social movement and left organizations, largely outside of formal legal and elite academic spaces.").

407. BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 117 (1981) (defining freedom as "positive social equality that grants all humans the opportunity to shape their destinies in the most

core ideological influence on the contemporary abolitionist movement.[408] We thus turn to a discussion of the role of rights and litigation in this abolitionist project, and in so doing, touch on principles that, reciprocally, might inform constitutional meaning and guide legislative actions.

In recent decades, the literature on courts and social change has shown renewed interest in the role of social movements in the process of spurring legal and political transformations.[409] Scholars have shed light on the relationship between movements and legal change with concepts such as "demosprudence,"[410] "popular constitutionalism,"[411] and "community constitutionalism."[412] Demosprudence, for instance, describes a mechanism through which groups that traditionally have been contained as legal and political outsiders take actions that disrupt—and ultimately transform—constitutional meaning.[413] The demosprudential process is one in which "mobilized constituencies . . . challenge basic constitutive understandings of justice in our democracy,"[414] and in so doing, spur jurisprudential developments.[415]

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healthy and communally productive way."). For an application to education, see BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 4 (1994) (describing "the difference between education as the practice of freedom and education that merely strives to reinforce domination").

408. Center for the Study of Race, Politics, and Culture, *Angela Y. Davis at the University of Chicago—Feminism and Abolition: Theories and Practices for the Twenty-First Century*, YOUTUBE (May 10, 2013), https://youtu.be/IKb99K3AEaA (describing the emergence of radical women of color feminism and its relationship to abolitionist organizing); *see also* ANGELA DAVIS GINA DENT, ERICA MEINERS, BETH RICHIE, ABOLITION. FEMINISM. NOW. (2021).

409. Amna A. Akbar, Sameer Ashar, and Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. (forthcoming 2021); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 289 (2019) ("[P]opular participation need not be mediated through representatives, but can and should also spring up through direct forms of participation and contestation."); Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352 (2015); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014); Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005).

410. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); *see also* Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15–16 (2008) (conceptualizing demosprudence as "legal practices that inform and are informed by the wisdom of the people," which are "democracy-enhancing").

411. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

412. Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 141–42 (2018) (documenting "a community constitutionalism . . . based on alterative perceptions of property rights expressed by on-the-ground protesters").

413. Guinier & Torres, *supra* note 412, at 2749–58.

414. *Id.* at 2760.

415. *Id.*

Without suggesting that the call to recognize a liberty-based right to quality education emerges directly from "mobilized constituencies," we note that our proposal aligns closely with the abolitionist project as conceived by some of its leading movement proponents.[416] Materially the remedy for violations of this federal right could track the prominent movement demand of "invest-divest,"[417] which calls for divestment from policing in all forms and investment in life-affirming resources necessary to thrive.[418] In the education context, the Movement 4 Black Lives (M4BL), an umbrella group of over 150 self-identified abolitionist organizations,[419] envisions a federal constitutional amendment establishing a right to education.[420] The content of the proposed amendment differs sharply from the "minimally adequate education" or basic literacy right contemplated by federal courts to date.[421] Resembling much more closely a right of the type we propose:

416. For other existing recommendations in the literature, *see, e.g.*, Deborah Fowler, Madison Sloan, and Ellen Stone, *Making the Case for a School and Neighborhood Desegregation Approach to Deconstructing the School-to-Prison Pipeline*, 42 U. ARK. LITTLE ROCK L. REV. 723 (2020) (recognizing the relation between school segregation and the school-to-prison pipeline); David M. Fox, *Breaking the Geographic Barrier Removing Residency Requirements from California Public School Enrollment*, 52 U.C. DAVIS L. REV. ONLINE 297 (2019) (recommending legislative and administrative solutions including open enrollment and tax revision); Kiel, *supra* note 295, at 641 (describing the transfer option from "failing" schools under the No Child Left Behind act and the lack of meaningful options when "district sovereignty" remain intact); *see also* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1475–78 (2016) (advocating for a Third Reconstruction). For a broad review of "[l]egal scholarship['s] . . . reckoning with the centrality of the violence of policing to the United States," *see generally* Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 101, 108–20 (2020) [hereinafter *Abolitionist Horizon*].

417. *Abolitionist Demands*, *supra* note 409, at *10 ("Invest-divest focuses attention on the size and scale of the criminal system, makes a call to divest from and shrink that system, and brings attention to alternative modes of social response."). The Movement 4 Black Lives popularized the "Invest-Divest" demand in 2015, although the concept is attributed to Eddie Ellis. AirGo Radio, *Episode 253—The Abolition Suite Vol. 2: Mariame Kaba* (July 7, 2020), https://airgoradio.com/airgo/2020/7/7/episode-253-the-abolition-suite-vol-2-mariame-kaba ("When I hear folks from the Movement 4 Black Lives . . . coming up in 2015 saying 'invest-divest,' I smile because I know that's Eddie Ellis. . . . He made it possible for us to think about invest-divest."); *see also Eddie Ellis, Prison Reform Visionary*, OUR TIME PRESS (Aug. 5, 2019), https://www.ourtimepress.com/eddie-ellis-prison-reform-visionary/.

418. MOVEMENT 4 BLACK LIVES, INVEST-DIVEST (2020) ("We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging, and harming of Black people"), https://m4bl.org/policy-platforms/invest-divest/ [hereinafter INVEST-DIVEST]; *see also generally* MOVEMENT 4 BLACK LIVES, POLICY PLATFORMS (2020), https://m4bl.org/policy-platforms/. However, we do not believe that the funding for improved schools must await disinvestment in prisons.

419. MOVEMENT 4 BLACK LIVES, ABOUT US ("We are Abolitionist. We believe that prisons, police and all other institutions that inflict violence on Black people must be abolished and replaced by institutions that value and affirm the flourishing of Black lives."), https://m4bl.org/about-us/; *see also id.* ("We believe and understand that Black people will never achieve liberation under the current global racialized capitalist system.").

420. INVEST-DIVEST, *supra* note 422.

421. *See supra* notes 41 and 263 and accompanying text.

> A constitutional amendment would also provide a chance to clearly articulate the *necessary components of a quality education*, which include the right to: a free education for all, wrap around services, a social worker for every 40 students, free health services (including reproductive body autonomy and dental care), a curriculum that acknowledges and addresses youth's material and cultural needs, physical activity and recreation, high quality food, free daycare, *freedom from unwarranted search, seizure or arrest* . . . . The amendment would also acknowledge the right of students to respect and dignity.[422]

Similar demands are reflected in the BREATHE Act—federal legislation also championed by M4BL—which has earned support from Rep. Ayanna Pressley and Rep. Rashida Tlaib.[423] The education provisions of the BREATHE Act would prohibit federal law enforcement from being within 1,000 feet of any public or private schools[424] and incentivize states and localities to remove police and school resource officers from schools,[425] close youth jails,[426] alter school funding formulas for funding equity,[427] repair and renovate school facilities,[428] increase access to adult education for incarcerated and formerly incarcerated persons,[429] provide additional services,[430] and develop curricula on the political, economic, and social legacies of colonialism, genocide against indigenous people, and slavery.[431] Numerous other popular movement demands for education reform either embrace the invest-divest framework or mirror its substance, as reflected in slogans such as "counselors, not cops."[432]

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422. MOVEMENT 4 BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM & JUSTICE, https://m4bl.org/wp-content/uploads/2020/05/Education-Amendment-Policy-Brief.pdf (emphasis added).

423. Selena Hill, *Reps. Ayanna Pressley and Rashida Tlaib Announce the BREATHE Act, Calling for Defunding Police, Reparations, and Universal Basic Income*, BLACK ENTERPRISE (July 10, 2020) https://www.blackenterprise.com/reps-ayanna-pressley-and-rashida-tlaib-announce-the-breathe-act-calling-for-defunding-police-reparations-and-universal-basic-income/.

424. M4BL, THE BREATHE ACT: FEDERAL BILL OUTLINE (unpublished draft) (on file with authors). Although most policing is a local matter, scholars have documented how federal agenda-setting through bureaucracies such as the Law Enforcement Assistance Administration dramatically altered the nature of state and local carceral systems. *See generally* HINTON, WAR ON CRIME, *supra* note 180.

425. FEDERAL BILL OUTLINE, *supra* note 428.

426. Movement 4 Black Lives, THE BREATHE ACT: BILL SUMMARY 7 (July 2020), https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf.

427. *Id.* at 7.

428. *Id.* at 8

429. *Id.*

430. *Id.* at 7–8.

431. *Id.* at 7.

432. *See, e.g.*, ADVANCEMENT PROJECT ALLIANCE FOR EDUCATIONAL JUSTICE, DIGNITY IN SCHOOLS CAMPAIGN, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., POLICE IN SCHOOLS ARE NOT THE ANSWER TO SCHOOL SHOOTINGS 5 (2018), https://advancementproject.org/wp-content/uploads/2018/03/Police-In-Schools-2018-FINAL.pdf (demanding divestment from "criminalization infrastructure," and investment in "psychologists, therapists, counselors, social workers, and nurs-

Similarly, fulfillment of the federal constitutional right we describe would require divesting from carceral systems within public schools and investing in curricula, learning materials, facilities, and services.[433] In this way our project aligns with, and offers another tool to, abolitionist organizing led by communities and young people combatting confinement in carceral schools.[434] Implementing such a right would not, standing alone, fulfill the maximalist vision advanced by movement demands. Crucially, however, we believe that it neither undermines that maximalist vision nor legitimizes the subordinating systems that popular movements seek to dismantle.[435] Moreover, in contrast with a right to basic literacy, our proposed federal right connects closely to the calls of organizers mobilizing to defund policing in their schools and to fund other services that contribute to human flourishing.[436] As such, it is complementary to, and compatible with, aboli-

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es[.]"); ADVANCEMENT PROJECT, WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS, https://advancementproject.org/wecametolearn/; DIGNITY IN SCHOOLS CAMPAIGN, WHY COUNSELORS,NOTCOPS?(2018), http://dignityinschools.org/wpcontent/uploads/2018/10/WhyCounselorsNotCops.pdf; Angela Helm, *Counselors, Not Cops: New Yorkers Protest Millions Proposed for School Safety Budget, Saying Money Fuels School-to-Prison Pipeline*, ROOT (Mar. 21, 2019), https://www.theroot.com/counselors-not-cops-new-yorkers-protest-millions-prop-1833464478; *see also generally* DREAM DEFENDERS, DEFUND POLICE,REBUILDOURCOMMUNITIES(2020), https://secure.everyaction.com/p/PN6aQpREDU6OccefBqxPmQ2; GIRLS FOR GENDER EQUITY, SUSTAINING POLICE-FREE SCHOOLS THROUGH PRACTICE: A TOOLKIT FOR NEW YORK CITY COMMUNITIES (2020), https://www.ggenyc.org/the-schools-girls-deserve/police-free-schools-toolkit/.

433. Obviously, fulfilling the right to quality public schooling requires investments in the elements necessary for a good education. But it could also require reducing the liberty restrictions—including but not limited to policing—students experience during the school day. *Cf. Gary B. v. Whitmer*, 957 F.3d 616 at 642 (6th Cir. 2020) (finding that, to assess a liberty-based claim, the court would need evidence about, *inter alia*, the "restrictions on [students'] liberty throughout the typical school day."). As discussed *supra* notes 184–226 and accompanying text, these liberty restrictions within carceral schools are extensive and extremely harmful.

434. *Cf. Abolitionist Demands*, *supra* note 409, at *10 ("Transformative demands come out of campaigns, mass movements, and organizations that center and are run by people directly impacted . . . . Indeed, they must be the ones diagnosing problems and proposing and implementing solutions, engaging in self-governance.").

435. Abolitionist movements generally oppose reforms that seek to humanize or reduce bias in carceral processes. They argue that such reforms legitimize carceral systems, and entrench carceral infrastructure by investing more resources into that infrastructure. *See generally* SURVIVED & PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS (2020), https://bit.ly/NYAbolitionistAssessment (identifying questions to ask of any reform to determine whether it is consistent with abolitionist principles, such as "Does it . . . legitimize or expand the carceral system we're trying to dismantle?"). For an example of such a reform, *see* NEW YORK CIVIL LIBERTIES UNION, MODEL MEMORANDUM OF UNDERSTANDING FOR SCHOOL RESOURCE OFFICERS, https://www.nyclu.org/sites/default/files/field_documents/mou_recommendations_for_schools_and_police_0.pdf (providing for training on bias, cultural sensitivity, disability rights, crisis intervention, and de-escalation, as well as for removal for use of force or acts of bias).

436. *See generally* #COPSOUTCPS, A REPORT ON WHY IT'S TIME FOR CHICAGO PUBLIC SCHOOLS TO DIVEST FROM THE CHICAGO POLICE DEPARTMENT (June 2020), https://copsoutcps.com/wp-content/uploads/2020/06/CopsOutCPS-Report-6.16.20-1.pdf (calling for the $33 million invested in

tionist movement demands. Indeed, a liberty-based right to quality education, as outlined here, fulfills the criteria of a "transformative reform that advance[s] an abolitionist horizon," as described by Amna Akbar and Marbre Stahly-Butts:

> (1) the reform shrinks the criminal legal system; (2) the reform relies on modes of political, economic, social organization that contradict prevailing arrangements, and gesture at new possibilities; (3) the reform builds and shifts power into the hands of those directly impacted, who are often Black, brown, working class, and poor; (4) the reform acknowledges and repairs past harm; and (5) the reform improves material conditions of directly impacted people.[437]

Whether pursued through legislation, constitutional amendment, or litigation, to recognize a liberty-based constitutional right to quality public education, abolishing carceral schools aligns with this movement-defined vision of transformation.

CONCLUSION

In this article, we have focused on the project of abolishing public schools that rely on punitive and carceral approaches to the education of Black, Brown, and poor children. Our project—like that of prison abolition—is not just a project of dismantlement.[438] Rather, if the law is to play a role in children securing the equal liberty they need to grow and flourish, it must, as abolitionist organizer Mariame Kaba says, facilitate the "building up of new ways of . . . relating with each other."[439] To be sure, today's abolitionists—as was true of those in the 1850s—can find much in constitutional law that enables racial oppression.[440] But in this article we have tried to show that the Constitution also can provide a framework for creative demands of equality and liberty. Although lawyers' role in the movement for abolition is peripheral, legal argument can support new ideas about constitutional meaning—ideas that respond to the historical and current experience of Black, Brown, and poor children facing confinement in carceral

school resource officers to be put towards counselors, social/emotional learning, and other services and programs that promote safety and development).

437. *Abolitionist Demands*, *supra* note 403, at *4–*5.

438. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1167-68 (2015) ("Prison abolition . . . is an aspirational ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls.").

439. AirGoRadio, *Episode 29—Mariame Kaba* (Feb.4,2016), https://soundcloud.com/airgoradio/ep-29-mariame-kaba.

440. *See, e.g.*, *Abolitionist Horizon*, *supra* note 420, at 109 ("The Supreme Court's Fourth Amendment jurisprudence facilitates, rather than constrains, police violence.").

public schools. We hope that this article contributes toward collective efforts that seek to achieve a better "society in the making."[441]

441. Roberts, *supra* note 8, at 122. *See also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018) (describing abolition constitutionalism as "reconstructive and visionary, pushing for a radical reimagination of the state and the law that serves it. It is here that legal scholars may have the most to learn from, and the most to contribute, if we imagine collaboratively with these movements.").